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The California Supreme Court Survey: A Review of Decisions: July-November 1980

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The California Supreme Court Survey

A Review of Decisions: July-November 1980

The introduction of the California Supreme Court Survey in this issue of the Pepperdine Law Review marks a new and continuing addition to the review. It is hoped that each issue's discussion and analysis of precedential supreme court cases will provide a useful source of material for the legal practitioner. A survey of decisions will appear in issues one, two and four of each volume.

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I. CONSTITUTIONAL LAW

A. CRIMINAL DUE PROCESS

1. *Voir Dire Examination*: *Hovey v. Superior Court of Alameda County*

The California Supreme Court in Hovey v. Superior Court of Alameda County¹ held that although a juror may be fair and impartial in determining the guilt of a defendant charged with a capital crime, that juror may be removed for cause from serving at that phase if such juror is unequivocally opposed to the death penalty at the separate trial on the penalty issue.

I. INTRODUCTION

Petitioner Hovey, charged with murder and kidnap, brought a pretrial motion to limit the exclusion for cause of jurors on the ground that although they could impartially sit at the guilt phase of a trial, they could not objectively sit at the penalty phase of a bifurcated capital trial.² The basis of the motion was that such exclusionary practices denied him due process of law under the state and federal constitutions, and also denied him the right to an impartial jury,³ as it resulted in an unrepresentative jury on

1. 28 Cal. 3d 1, 616 P.2d 130, 168 Cal. Rptr. 128 (1980) (opinion by Bird, C.J., Mosk, Newman, J.J. concurring; Richardson, Clark and Manuel, J.J. concurring and dissenting). Justice Richardson concurred in the portion of the judgment denying petitioner's motion to limit exclusion of jurors for cause but dissented in the portion granting petitioner's request to provide individualized voir dire examinations. Justices Clark and Manuel concurred in Justice Richardson's opinion.

2. CAL. PENAL CODE § 190.1 (West Supp. 1980):

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trial of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

3. U.S. CONST. Amend. IV and XIV; CAL. CONST. art. I §§ 7, 15, and 16.

the issue of guilt.⁴

The evidence in support of petitioner's contention was developed at a separate hearing which covered seventeen court days. Over 1,000 pages of exhibits, consisting mostly of sociological studies, were admitted into evidence.

While the trial court denied the request to limit juror exclusion under section 1074 of the California Penal Code,⁵ the petitioner invoked the original jurisdiction of the California Supreme Court filing for a writ of mandate because of the importance of the questions presented.

As with the other instances⁶ in which such a proposition has been asserted, the court ultimately found that the petitioner had not met his burden of proof⁷ of establishing that jurors qualified to sit in capital cases in California were more likely to convict than those qualified to sit in noncapital cases.⁸ The petitioner presented numerous empirical studies supporting his contention that a jury qualified to sit in a capital case under the controlling standards announced in *Witherspoon v. Illinois*⁹ is less than neu-

4. This same contention was made in *Witherspoon v. Illinois*, 391 U.S. 510, 516-18 (1967), and in *People v. Velasquez*, 26 Cal. 3d 425, 433, 606 P.2d 341, 162 Cal. Rptr. 306 (1980).

5. CAL. PENAL CODE § 1074 (West 1970). This statute reads in relevant part:

A challenge for implied bias may be taken for all or any of the following causes, and for no other: . . . 8. If the offense charged be punishable by death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty: in which case he must neither be permitted nor compelled to serve as a juror.

6. See note 4 *supra*.

7. 28 Cal. 3d at 17 n.37, 66 P.2d at 1308 n.37, 168 Cal. Rptr. at 135 n.37. *Hovey* found that the court in *Witherspoon* placed the burden of proof on the defendant as to the nonneutrality of a California jury in a capital case, and that burden is to establish a "substantial doubt" that such jury is neutral in regard to determining the issue of guilt or innocence. See *Witherspoon v. Illinois*, 391 U.S. 510, 517 (1967). The fact that the court found the studies presented by the petitioner in this case insufficient to establish the proposition that jurors in favor of the death penalty favor the prosecution indicates that the burden of proof is on the petitioner.

8. 28 Cal. 3d at 67, 66 P.2d at 1346, 168 Cal. Rptr. at 172. The majority states that even if the petitioner had proven that California juries in capital cases tend to convict more than if such juries included persons unequivocally opposed to the death penalty at the guilt phase, such evidence would not prove that capital juries are more likely to convict than juries in noncapital cases. This, the court asserts, is the crux of the matter. Juries in noncapital cases would include persons eligible to serve in capital cases as well as those unequivocally opposed to the death penalty and those who would vote for death in any capital case. Only a difference in conviction proneness between these two juries would warrant a finding that capital juries were partial.

9. 391 U.S. 510 (1967). In *Witherspoon*, an accused had been convicted of

tral with respect to the determination of guilt. The studies, however, were not applicable to California juries who were qualified regarding the death penalty issue, because the juries were composed of different groups.¹⁰

The high court did find that petitioner's second major contention had merit and held that the portion of the voir dire examination of potential jurors dealing with death qualification should, hereafter, be conducted individually and in sequestration.

II. HISTORICAL ANALYSIS

Although the literal wording of California Penal Code's section 1074, subdivision 8, authorizes removal of a juror for cause only where his or her opposition to capital punishment would "preclude his finding the defendant guilty,"¹¹ it was judicially construed in *People v. Riser*¹² to allow the exclusion for cause of jurors whose views on the death penalty would affect the penalty determination.

While *Riser* was decided before the legislature provided for the bifurcation of trials on the issues of guilt and penalty in capital cases,¹³ the *Riser* court's interpretation of the code section was af-

murder and given the death sentence. The statutes in effect at that time allowed the prosecution to excuse for cause any prospective jurors who had "conscientious scruples against capital punishment, or . . . [was] opposed to the same." The Supreme Court reversed Witherspoon's sentence but upheld the murder conviction. The high court found that it was obvious that if a state excuses all persons from a jury deciding one's penalty who have any doubts about the wisdom of the death sentence, the jury is unnaturally willing to render a sentence of death.

10. 28 Cal. 3d at 63, 616 P.2d at 1343, 168 Cal. Rptr. at 170. Of the spectrum of beliefs in regard to the death penalty, there are five groups represented: those that would automatically vote for the death penalty in any capital case, those that favor the death penalty but would not vote to impose it in every capital case, those that are indifferent to it, those that oppose it, but would not automatically vote against it in every case, and those that are unequivocally opposed to it and would never consider voting for its imposition under any circumstances. *Id.* at 20, 616 P.2d at 1311, 168 Cal. Rptr. at 138.

While a *Witherspoon* qualified capital jury theoretically consists of persons who automatically approve of the death penalty, the group which favors the death penalty, the group which is indifferent, and the group which opposes the death penalty, California excludes from juries trying capital cases the group which automatically supports the death penalty. This is the essential difference upon which the case turns. *Id.* at 63-64, 616 P.2d at 1343-44, 168 Cal. Rptr. at 170.

11. See note 5 *infra* and accompanying text.

12. 47 Cal. 2d 566, 575-76, 305 P.2d 1, 7 (1956). While a literal reading of section 1074, subdivision 8 of the California Penal Code does not compel the exclusion of jurors incapable of exercising the discretion of whether to impose a death or life imprisonment sentence, it would be doing violence to the purpose of section 190 of the Penal Code to construe section 1074, subdivision 8 to allow those jurors to serve. The result would be a de facto abolition of capital punishment, which is not proper for the court to achieve through construction of an ambiguous statute.

13. See note 2 *infra*.

firmed by subsequent decisions.¹⁴ These subsequent decisions interpreting section 1074 of the Penal Code noted the legislature's preference for one jury to determine both the issue of guilt and penalty.¹⁵ These decisions promoted judicial economy and efficiency. Judicial economy was served by eliminating the need to qualify a second jury. Efficiency was promoted by avoiding the need to repeat the presentation of the evidence considered in the guilt phase of the trial.¹⁶ Thus, it was common practice to exclude prospective jurors from serving at either phase of a trial involving a capital crime if their opposition to the death penalty was so strong as to require their exclusion under the standards of *Witherspoon*.¹⁷ A literal reading of section 1074, subdivision 8, of the Penal Code, appears to grant the petitioner the relief requested. This is due to the language which indicates that only those persons whose beliefs regarding the death penalty would preclude them from making an impartial decision, would be excluded from the jury.

Prior to the *Witherspoon* decision, jurors were excluded for cause under Penal Code section 1074 if they voiced any general objections or conscientious scruples against capital punishment.¹⁸

14. *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1966). As the legislature, in providing for a separate penalty trial in murder cases, expressed its preference for one jury to act throughout the entire case, it was not improper for the court to excuse jurors for cause who stated that they would have been able to fairly and objectively adjudicate the issue of guilt even though they were conscientiously opposed to capital punishment. There is no merit to the assertion that such jurors should serve at the guilt phase of the trial and then the court should impanel a new jury, if necessary, for the determination of the penalty. Since the evidence introduced at the guilt trial is also relevant to the penalty determination, having the same jury serve throughout both phases avoids repetition of evidence and is not an arbitrary requirement. *People v. Smith*, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966), found that the enactment of section 190.1 of the California Penal Code was not to be construed as evidence of the legislative intent to overrule *Riser*. Rather, a closer examination of that section of the code discloses the legislative directive that whenever possible the same jury is to serve at both phases of a capital trial. This serves the purposes of continuity and economy of effort. Such practice neither denies a defendant due process of law nor favors the prosecution over the defense.

15. See note 2 *infra*. The relevant sentence, as referred to in *People v. Smith*, 63 Cal. 2d 779, 789, 409 P.2d 222, 229, 48 Cal. Rptr. 382, 389 (1966), is that "If the defendant was convicted by a jury, the trier of fact shall be the jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty."

16. See note 14 *infra*.

17. *Witherspoon v. Illinois*, 391 U.S. at 522-23 n.21.

18. 28 Cal. 3d at 9, n.10 & 11, 616 P.2d at 1303, n.10 & 11, 168 Cal. Rptr. at 130, n.10 & 11. The court admits that it has not always been consistent as to what is suffi-

The standards were not clear. The United States Supreme Court conclusively resolved the conflict in *Witherspoon* by holding that the only jurors who could be constitutionally excused for cause were:

[T]hose who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.¹⁹

Subsequent cases in California have followed the Supreme Court's decision.²⁰ These decisions have emphasized that general opposition to the death penalty is not sufficient. To properly exclude a prospective juror for cause under *Witherspoon* standards, there must be some clear indication that the juror would be unable to follow his oath and put his personal feelings aside.

Although the defendant in *Witherspoon* asserted that an unrepresentative jury on the issues of guilt and penalty would result from excluding jurors for cause because of their unequivocal opposition to the death penalty, the Supreme Court found the empirical studies offered in support of this contention unpersuasive.²¹ However, the Court specifically left the issue open and noted that an accused "in some future case might still attempt to establish that [a] jury [which had been death-qualified

cient to exclude one because of his or her opposition to the death penalty before *Witherspoon*. While "mere doubts with respect to the death penalty" were not sufficient where a juror believed he or she could consider it in the proper case, other standards enunciated indicated a more stringent test. *Id.*

19. 391 U.S. at 522-23 n.21.

20. *People v. Lanphear*, 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601 (1980) stated:

We are compelled by *Witherspoon* and its progeny to recognize certain principles said to flow therefrom. Thus, expression of scruples against the death penalty or abhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient; the juror must indicate that his beliefs or feelings will automatically, whatever the circumstances, prevent him from voting for the death penalty or will affect his determination of the defendant's guilt.

Id. at 841-42, 608 P.2d at 703, 163 Cal. Rptr. at 615. *People v. Varnum*, 70 Cal. 2d 480, 450 P.2d 533, 75 Cal. Rptr. 161 (1969). In applying the *Witherspoon* principle that a death sentence can not be carried out if the jury was chosen by excluding veniremen who voiced merely general objections to the idea of capital punishment, the court must ascertain whether a prospective juror who has excused for cause made it unmistakably clear that he would automatically vote against imposition of the death penalty regardless of the evidence adduced at trial. The court must assess the responses of the veniremen in the full context of that portion of the court and counsel's voir dire examination of the entire panel conducted during the time the veniremen were present in the court room. In *In re Mathis*, 70 Cal. 2d 467, 450 P.2d 290, 74 Cal. Rptr. 914 (1969), the court held that where veniremen who voiced only general objections to the death penalty were excused for cause without being granted the opportunity to explain their individual attitudes, a sentence of death must be reversed.

21. *Witherspoon v. Illinois*, 391 U.S. at 517-18.

in compliance with the newly announced *Witherspoon* standards] was less than neutral with respect to guilt."²²

The California Supreme Court was confronted with the same contention as that advanced in *Hovey* only a few months earlier. In *People v. Velasquez*,²³ decided in February, 1980,²⁴ a defendant sentenced to death asserted that the rule in *Witherspoon* resulted in a jury which is unrepresentative at the guilt phase of the trial and would thus be more likely to convict than the initial jury.²⁵ The court, however, failed to reach the merits of that contention because it found the defendant lacked standing. The court asserted that "[t]he important issue he raises concerning the fairness of a death qualified jury can be properly reached on direct appeal only in a case in which the *Witherspoon* test itself has actually excluded for cause a juror able to render a fair and impartial verdict at the guilt phase."²⁶ Thus, when a proper defendant presented the issue of the neutrality of a capital jury qualified under *Witherspoon* standards, the time was ripe for an extended consideration of the issue.

III. CASE ANALYSIS

Two major challenges to the system of jury selection and death qualification were raised by the petitioner. The first challenge suggests that the current class of jurors who would be excluded under *Witherspoon* be limited to permit a certain subcategory to serve during the guilt phase of a capital trial. These jurors would be fair and impartial in determining the issue of guilt. However, their opposition to capital punishment would make them unable to serve at the penalty phase.²⁷ This proposition is based on two

22. *Id.* at 520 n.18.

23. 26 Cal. 3d 425, 606 P.2d 341, 162 Cal. Rptr. 306 (1980). The court did not reach the merits of the issue because it found that none of the prospective jurors fell within the class of persons who, although qualified to serve in a capital jury in other respects, could properly be excused under *Witherspoon*. *Id.* at 433, 606 P.2d at 345, 162 Cal. Rptr. at 310.

24. *Velasquez* was decided in February of 1980 while *Hovey* came down in August of that same year.

25. *People v. Velasquez*, 26 Cal. 3d at 433, 606 P.2d at 345, 162 Cal. Rptr. at 310.

26. *Id.*

27. 28 Cal. 3d at 17 n.36, 616 P.2d at 1308 n.36, 168 Cal. Rptr. at 135 n.36. The group that petitioner seeks to have included at the penalty phase are called the "automatic life imprisonment" group whose members consist of those persons who would never vote to impose the death penalty no matter what the facts of the case were. The members are referred to in *Hovey* as "guilt phase includables."

constitutional theories. The first is based on the theory promoted in *Witherspoon*, where the petitioner asserted that he could establish that such juries are less than neutral in respect to determination of the issue of guilt.²⁸ The other theory is based on the "purpose and functioning" analysis of *Ballew v. Georgia*,²⁹ which held that the function of a criminal jury was a safeguard for the defendant against an abusive prosecutor.

The second major challenge to the system of jury selection in capital cases is that the currently employed voir dire methods tend to adversely affect jurors from the defendant's perspective. The petitioner contends that the procedure used for qualification on the death penalty issue works in such a fashion as to ultimately bias the selected jurors in favor of the prosecution. Consequently, whoever is selected to sit as a juror is likely to be less than neutral in regard to determining the issues of guilt and the penalty to be imposed.³⁰

In consideration of the challenges presented, the court found that the concept of a neutral jury was essential to the resolution of the matter. In *Witherspoon*, the concern was with achieving neutrality through diversity in the jury pool. "A neutral jury is one drawn from a pool which reasonably mirrors the diversity of experiences and relevant viewpoints of those persons in the community who can fairly and impartially try the case."³¹ This notion of a neutral jury is a long standing constitutional doctrine.³² This concept is relevant to the determination of guilt and penalty.

28. 28 Cal. 3d at 17 n.37, 616 P.2d at 1308 n.37, 168 Cal. Rptr. at 135 n.37. "[P]etitioner's burden of proof in the present proceeding is to establish a 'substantial doubt' as to whether a 'California death-qualified' jury is neutral with respect to guilt." *Id.*

29. 435 U.S. 223 (1978). The court in *Ballew* held that a criminal conviction rendered by a jury composed of only five persons violated the sixth and fourteenth amendments of the United States Constitution. Under the "purpose and functioning" analysis used by the court, the court inquires of the purpose and functioning of a jury in a criminal trial and determines whether the challenged procedure impaired it to any significant degree. Since the Supreme Court determined that the purpose of a jury in criminal trials was to provide a safeguard between an over enthusiastic or dishonest prosecutor and the accused, it found that the practice of using only five people in a jury undermined that purpose. Relying on empirical studies, the Court found a jury so composed was "less likely to foster effective group deliberation," and was prone to "inaccurate factfinding and incorrect application of the common sense of the community to the facts." *Id.* at 232.

30. 28 Cal. 3d at 18, 616 P.2d at 1308, 168 Cal. Rptr. at 136.

31. *Id.* at 19-20, 616 P.2d at 1310, 168 Cal. Rptr. at 137 (footnote omitted).

32. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (held as unconstitutional a state's law excluding blacks from jury service where a black man was convicted by such a jury); *Taylor v. Louisiana* 419 U.S. 522 (1975) (held that the systematic exclusion of women from the jury pool was a violation of the sixth and fourteenth amendment requirement that a jury represent a fair cross section of the community).

While *Witherspoon* established that a jury comprised only of persons who are either indifferent toward the death penalty, favored it, or would automatically vote for it in any capital case, was less than neutral in regard to setting a penalty, the instant petitioner asserted the same with respect to the issue of guilt. However, in petitioner's view, and as reflected in the numerous studies submitted in support of his contention,³³ the jurors selected to serve on capital cases consisted of persons in the pre-*Witherspoon* categories including those who are opposed to the death penalty but who would not automatically vote against it in any situation.³⁴

California jurors who are qualified as to the death penalty issue, however, differ from those in *Witherspoon*. "The pool of jurors eligible to serve in a capital trial in California consists of those persons eligible to serve in a noncapital case whose attitudes toward capital punishment would place them in either the 'favor death penalty', 'indifferent', or 'oppose death penalty' group."³⁵ The problem with the petitioner's studies is that none focused on a jury pool comprised of these groups but rather on the inadequacy of a pool of *Witherspoon* qualified jurors. That group, however, contains the automatic death penalty group and, thus, the petitioner failed to demonstrate any deficiencies in the California juries used in cases involving capital crimes.³⁶

More fundamentally, however, is even if the studies indicated capital juries in California tended to return more convictions than they would if they included the subcategory which the petitioner seeks to have represented at the guilt phase, "it does not necessarily follow that the former would also tend to be more conviction-prone than are jurors in noncapital case[s]. It is this latter showing which is the crux of the *Witherspoon* issue."³⁷

33. 28 Cal. 3d at 26-60, 616 P.2d at 1314-41, 168 Cal. Rptr. at 141-68.

Approximately twenty-four studies, surveys, and experiments were introduced at the evidentiary hearing and were the subject of expert testimony at trial. The California Supreme Court divided them into four categories for analysis purposes: the studies relating to conviction proneness and juror voting tendency, studies on juror attitudes, studies on demographic characteristics, and the research on juror evaluation of evidence.

34. See note 10 *infra*.

35. 28 Cal. 3d at 63, 616 P.2d at 1343, 168 Cal. Rptr. at 170.

36. *Id.* at 63-64, 616 P.2d at 1343-44, 168 Cal. Rptr. at 170-71.

37. *Id.* at 67 n.115, 616 P.2d at 1346 n.115, 168 Cal. Rptr. at 173 n.115.

The essential showing is that a jury qualified to serve in a capital case is more likely to convict than a noncapital jury, which includes persons holding the entire spectrum of beliefs as to the death penalty.

Petitioner Hovey sought to overcome the imperfections in the studies by asserting that the group of persons automatically approving the death penalty is relatively minute as compared to persons who would automatically vote against its imposition.³⁸ The petitioner, however, presented no evidence supporting this contention. The court was not persuaded by a recent United States Supreme Court decision that took note of the relatively small size of the group of persons who "believe literally in the Biblical admonition 'an eye for an eye.'" ³⁹ In that case, the State of Texas sought to defend a law that allowed the exclusion of prospective jurors on broader grounds than permitted by *Witherspoon*. The Supreme Court rejected its argument that the statute was neutral because it allowed a challenge for cause to jurors whose views in favor of the death penalty would affect their determination of facts as well as those whose opposition would do the same. The high court responded that "it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment."⁴⁰

The California Supreme Court indicated that more information was required before findings in respect to the nonneutrality of a *Witherspoon* qualified jury could be extrapolated to a California one. The impact and unity of such a group is also relevant, but there was no evidence offered on this point.⁴¹

There is one major problem with the majority's differentiation of California juries which are qualified by the exclusion of those persons who would automatically vote for the death penalty in any capital case. The petitioner's motion was brought, and the court's analysis was focused, on section 1074 of the Penal Code which specifically provides for the exclusion of prospective jurors unequivocally opposed to the death penalty. The few cases cited by the court for the proposition that California also excludes per-

38. *Id.* at 64-67, 616 P.2d at 1344-46, 168 Cal. Rptr. at 171-73.

39. *Adams v. Texas*, 100 S. Ct. 2521, 2528 (1980). In this case a defendant convicted of murder and sentenced to death appealed the sentence and the procedures employed to set a penalty. The United States Supreme Court found that *Witherspoon* was applicable to the state's bifurcated procedure whereby the jury merely answers statutorily prescribed questions which determine the penalty pronounced by the judge. However, the Court also found that *Witherspoon* and the Texas statute could not co-exist where a juror is excused for cause unless he can state, under oath, that a mandatory death sentence will not affect his determination of the factual issues. The Court found that the exclusion was not permissible where the statutory test employed excluded jurors who would say that they would be "affected" by the possibility of the death penalty when they actually meant that they would undertake deliberations with greater caution and seriousness.

40. *Id.*

41. 28 Cal. 3d at 66, 616 P.2d at 1346, 168 Cal. Rptr. at 173.

sons biased in favor of the death penalty fall under section 1073, which deals with challenges for cause on the grounds of implied and actual bias.⁴² The one case where the California Supreme Court dealt with this issue found:

[t]he entertaining of an immutably established opinion in favor of invariably selecting the death penalty in any case where the offense charged is punishable at the discretion of the jury either by death or imprisonment is such a "state of mind" . . . which will prevent [the juror] from acting with entire impartiality and without prejudice.⁴³

The reference is to section 1073 of the Penal Code, not section 1074.

Even if it was proven that the group automatically approving the death penalty is minute in size as compared with those holding beliefs at the opposite end of the spectrum, the petitioner fell short of establishing the essential theory: that juries excluding those that the petitioner would have included⁴⁴ would be more likely to convict than juries in noncapital cases.⁴⁵ The court concludes this issue by stating:

However, the study's omission of the 'automatic death penalty' group—which comprises an unknown proportion of the pool of jurors in noncapital cases—renders unsound petitioner's leap from the results of this study (that 'California death-qualified' jurors are more conviction prone than 'guilt phase includable' jurors) to the conclusion that 'California death-qualified' jurors are also more conviction-prone than a 'neutral' jury.⁴⁶

42. 28 Cal. 3d at 66, 616 P.2d at 1345, 168 Cal. Rptr. at 172. CAL. PENAL CODE § 1073 (West 1970) provides in relevant part:

Particular causes of challenge are of two kinds:

.....

Second—For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this Code as actual bias.

43. *People v. Hughes*, 57 Cal. 2d 89, 95, 367 P.2d 33, 36, 17 Cal. Rptr. 617, 620 (1967). The court stated that counsel for the defendant in a capital case had a right to question prospective jurors for the purpose of ascertaining whether any would vote to impose the death penalty in the event of a finding of guilt, without regard to the evidence. A challenge for such bias is not specifically provided for in section 1074 of the California Penal Code. Rather, section 1073 permits such a challenge for actual bias. The entertaining of such an established opinion of selecting the death penalty in any case where the offense charged is punishable at the jury's discretion by either death or imprisonment is such a "state of mind . . . which will prevent [a juror] from acting with entire impartiality and without prejudice" within the meaning of section 1073.

44. Those jurors who are sought to be included in the guilt phase as referred to by the *Hovey* court are those who could be entirely fair and objective at the guilt phase but not at the penalty phase. 28 Cal. 3d at 64-65, 616 P.2d at 1344, 168 Cal. Rptr. at 170-73.

45. *Id.*

46. *Id.* at 67, 616 P.2d at 1346, 168 Cal. Rptr. at 173. The reference is to the Ells-

The court did conclude, however, that the presently employed procedures for jurors to be qualified on the issue of the death penalty tended to prejudice them from an accused's perspective. Voir dire examinations occur in open court and in capital cases, there is extensive emphasis on the jurors' opinions on the death penalty. The court found that the focus on the penalty phase of the trial, which is contingent upon a finding of guilt, tends to lead jurors to infer that the second phase will be necessary. This is particularly so when the judge and counsel repeatedly question prospective jurors on their ability to hand down a death sentence before the issue of guilt has even been heard. Such procedures, it was found, could easily lead jurors to infer that those persons presumably familiar with the evidence in the case, that is, the judge and counsel, actually believe the defendant is guilty as charged and the penalty phase will surely ensue.

Further, constant focus on the hypothetical occurrence of the penalty phase could tend to desensitize jurors about the importance and seriousness of that determination.⁴⁷ Even those in favor of the death penalty may dread the prospect of having to make a personal decision as to whether another human being is to live or die. By repeatedly asking prospective jurors to imagine the penalty phase, and their ability or inability to render a death sentence, what was initially an intimidating decision may become easier to do because of constant exposure to the idea.

Thus, where jurors are predisposed to believe that the defendant is guilty by the very procedures that qualify them to sit on a capital jury, the court found that such members will tend to:

- (1) selectively perceive the evidence—e.g., 'forgetting', distorting, or actually failing to perceive evidence which conflicts with his or her preconceptions;
- (2) to draw only those inferences from the evidence which support those preconceptions and perhaps to 'create' data to reinforce those beliefs; and
- (3) to evaluate the evidence perceived—e.g., assess credibility of

worth Conviction-Proneness Study. The study, conducted in 1979, provided strong support for the proposition that jurors qualified to serve in capital cases are more likely to convict than those excludable under *Witherspoon* standards. *Id.* at 39-40, 616 P.2d at 1324-25, 168 Cal. Rptr. at 151-52. However, at the time it was conducted, no questions were asked of the subjects that would identify them as being a member of the group automatically approving the death penalty. When this problem became apparent, Dr. Ellsworth recontacted those subjects that indicated they strongly favored the death penalty by phone. Of the 23 persons who indicated this preference, she reached 22, all of whom stated that they would consider voting for life imprisonment, rather than death, if the evidence supported such a penalty. *Id.* at 66-67, 616 P.2d at 1344-45, 168 Cal. Rptr. at 172-73. The problem is with the reliability of this delayed call back procedure. Dr. Ellsworth herself admitted that it was possible that different answers to the call back questions might have been received had the questions been asked at the time the experiment was conducted. *Id.*

47. *Id.* at 75, 616 P.2d at 1350, 168 Cal. Rptr. at 178.

witnesses, weigh the inferences drawn—in a manner which tends to fulfill his or her expectations.⁴⁸

To minimize the possible prejudicial effects of group voir dire methods used in capital cases, the supreme court ordered, pursuant to its supervisory authority over the state's criminal procedure, that in the future, that portion of voir dire relating to jurors' beliefs about the death penalty is to be conducted in sequestration.⁴⁹ While the purpose of instituting this procedure is to minimize prejudice to a defendant, the court admitted that it was "unknown at this point whether such personal voir dire would entail the same dangers of inducing bias as do the current procedures for voir dire."⁵⁰

IV. CASE IMPACT

The impact of the court's holding as to the first issue, the non-neutrality of capital juries, appears to be limited in California absent further study into the matter. The case may, however, have effects upon those jurisdictions that rigidly adhere to *Witherspoon* standards in selecting capital jurors. It is extremely likely that surveys will be conducted to establish the size of the group which automatically approves the death penalty. Since the court seems to readily rely on such empirical research in its rulings, it would consider such evidence to conclusively put the proposition to rest, or point out the biased nature of capital juries in the state.

If future studies reveal that the death penalty group at issue is of insignificant size and impact, then the results of the petitioner's studies might be extrapolated to include California capital juries. If proven, then controlled studies and actual records of case outcomes might show that such juries are more conviction prone than noncapital juries. It would then follow that defendants in capital cases, under the right to a fair and impartial jury trial, would have won the right to have persons adamantly opposed to capital punishment sit at the guilt phase of the trial and be excused only for penalty determination. This is, of course, only if such jurors could be objective at the guilt phase determination.

This process of qualifying separate juries, or jurors, in the penalty phase could prove costly to the state's resources. Indeed, this is one of the major arguments presented against the court's reso-

48. *Id.* at 72, 616 P.2d at 1349, 168 Cal. Rptr. at 176.

49. *Id.* at 80, 616 P.2d at 1353, 168 Cal. Rptr. at 181.

50. *Id.* at 81, 616 P.2d at 1354, 168 Cal. Rptr. at 181.

lution of the second issue involving individualized voir dire.⁵¹

As for the majority's resolution of the voir dire procedural issue, Justice Richardson, in his dissent, asserts that such a cumbersome procedure will add a significant burden to the judiciary.⁵² He points out that group voir dire serves an educational function by demonstrating to the assembled panel the causes for disqualification and by clarifying abstract legal principles through applicable hypotheticals. Justice Richardson found that the new procedure will forego this benefit and each individual juror will have to be educated alone.

The minority further points out that any prejudicial effect suffered by the group voir dire examinations could be lessened by admonishing the jury.⁵³ Further, as the majority acknowledges,⁵⁴ sequestered voir dire may produce the same results that group voir dire produced. The emphasis and mystery surrounding death penalty issues may equally emphasize the penalty phase, and jurors could just as easily infer the same adverse facts to the defendant by the requirement that such questioning occur in private.

V. CONCLUSION

In *Hovey*, the California Supreme Court found that Penal Code sections 1074 and 190.1, as judicially interpreted in capital cases, did not deny an accused his sixth and fourteenth amendment rights. The petitioner failed to establish that exclusion of jurors unequivocally opposed to the death penalty from the guilt phase of the bifurcated trials in capital cases rendered the jury more likely to convict. The provision for bifurcated guilt and penalty determinations, and the exclusion for cause of jurors at the guilt phase, because of their inability to serve at the penalty phase, was reasonable in terms of judicial efficiency and economy.

While the petitioner did establish that *Witherspoon* qualified capital juries were more conviction prone than noncapital juries, this conclusion was found inapplicable to California capital juries because California requires that persons who would always vote in favor of the death sentence in a capital trial be excluded. However, this exclusion is for bias, not specifically because of a juror's opposition to electing life imprisonment as an alternative sentence.

The court did find that the process of qualifying jurors to serve

51. *Id.* at 83, 616 P.2d at 1355, 168 Cal. Rptr. at 182. (Richardson, J., dissenting).

52. *Id.*

53. *Id.* at 84, 616 P.2d at 1356, 168 Cal. Rptr. at 184.

54. See note 50 *infra* and accompanying text.

on capital juries tended to prejudice them in the prosecution's favor. Individualized, sequestered voir dire examinations on questions relating to a juror's views on capital punishment was ordered to remedy the situation in spite of the acknowledgement of the unknown effects of the new procedure and the burden it would impose on the judicial system.

2. *The Effect of Material Omissions Within Search Warrant Affidavits Under California Penal Code Section 1538.5-40: People v. Kurland*¹

Relying on decisions of the California Court of Appeal, the California Supreme Court formulates a method in which to deal with innocent, negligent, and intentional omissions present within a warrant affidavit. The distinction in effect between misstatements and material omission and the increased likelihood of deception in withholding material facts as a result of the court's decision is discussed.

I. INTRODUCTION

The California Supreme Court ruled that a facially valid search warrant affidavit may be challenged under California Penal Code sections 1538.5-1540² on the ground that it omits certain material facts that would have affected the finding of probable cause. This decision was based on the idea that the determinations of a neutral magistrate are as greatly tainted when an affidavit fails to include a material fact, as when it includes a misstatement.³ The remedy imposed for failure to include a material fact will vary according to the affiant's motive for committing the omission.

On April 6, 1976, Officers Bell and Matt of the Modesto Police

1. 28 Cal. 3d 376, 618 P.2d 213, 168 Cal. Rptr. 667 (1980).

The majority opinion was written by Justice Newman with Justices Tobriner, Mosk, Richardson, and Manuel concurring. Justice Clark wrote a separate concurring opinion and Chief Justice Bird authored the sole dissent.

2. CAL. PENAL CODE § 1538.5(a)(2) (West Supp. 1980) provides in pertinent part that a defendant may move to suppress evidence if the search and seizure with a warrant was unreasonable because the warrant was insufficient on its face or there was not probable cause for the issuance of the warrant.

3. The California Supreme Court has recently considered the problem of warrant-affidavits containing misstatements in *People v. Cook*, 22 Cal. 3d 67, 383 P.2d 130, 148 Cal. Rptr. 605 (1978), and *Theodor v. Superior Court*, 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972). The court was faced with the problem of omissions for the first time in *Kurland*. Although new to the supreme court, the issue has been raised in many prior court of appeal decisions, see note 25 *infra*. For a discussion of *Cook* and *Theodor*, see notes 20 and 23 *infra* and accompanying text.

Department obtained a warrant to search the defendant's store for cocaine and related paraphernalia. The search yielded a "coke" spoon, a vial of white powder, one and one-half pounds of marijuana, and a .38 caliber pistol.

Probable cause for the issuance of the warrant was principally supported by Officer Matt's affidavit which stated that a confidential informant, known as Z, had provided information that Z had seen the defendant in his store in possession of cocaine and marijuana, and that Z had been an eye-witness to other suspicious criminal behavior.⁴

The affidavit claimed Z to be a reliable informant who in the past had never failed to give reliable information. The affidavit further described Z as a former cocaine user and as one knowledgeable about its packaging and use. In addition, the affidavit recited Officer Matt's fear for Z's safety if his identity were disclosed.⁵

At the hearing to suppress the seized evidence, the defense counsel alleged that the affidavit was incomplete,⁶ asserting that the affidavit failed to disclose that Z had been convicted of a felony in 1974 after Officer Matt had filed a complaint against him, and that Z had been placed on probation. Officer Matt testified that at the time he signed the affidavit, he was not sure whether Z's probation had been terminated or violated. Officer Matt then denied that threats had been made against Z in order to insure his assistance against the defendant.

Granting defendant's motion to suppress the seized evidence on the ground that it had been taken pursuant to a defective warrant, the trial court reasoned that since the supporting affidavit failed to disclose "material information," the presiding magistrate might have been led to conclude differently with respect to the credibility of the informant Z. As a result, probable cause would

4. The defendant had confided in Z regarding his storage and sale of narcotics. Z had also seen a .38 caliber pistol in the defendant's store and had been told by the defendant that he intended to kill the next person with whom he found disfavor. The defendant had also asked informant Z to kill an unidentified individual who had "ripped him off" in a recent drug deal. 28 Cal. 3d at 381-82, 618 P.2d at 216, 168 Cal. Rptr. at 670.

5. Z's information about recent narcotic traffic through defendant Kurland's water bed store was substantiated by an affidavit submitted by Officer Ladd which was supported by information from informant X. X's information about the narcotics was held too stale to support a warrant to search the store. 28 Cal. 3d at 382 n.1, 618 P.2d 216 n.1, 168 Cal. Rptr. at 670 n.1; cf. *Alexander v. Superior Court*, 9 Cal. 3d 387, 508 P.2d 1131, 107 Cal. Rptr. 483 (1973) (information may be so stale that magistrate may not be fully informed nor justified in concluding information is reliable).

6. The defense counsel wished to argue that the affidavit had not met either prong of the test laid down in *Aguilar v. Texas*, 378 U.S. 108 (1964); see note 13 *infra* and accompanying text.

then have been negated.⁷

The People of the State of California asserted that the affidavit was not misleading and that any absent information was withheld in good faith. The California Supreme Court considered the problem of proper application of suppression and exclusionary rules when a warrant affidavit, although sufficient on its face, is challenged as incomplete. The court decided that a warrant would be treated differently, depending on the motivation behind the material omissions as shown in three situations: (1) the unintentional and reasonable omission; (2) omissions that result from negligence or an enforcement officer's careless over-zealousness; and (3) those omissions that are a product of an enforcement officer's intent to deceive or with reckless disregard of the omission's importance.⁸

II. HISTORICAL ANALYSIS

The court set out to examine the issue of information omitted from a supporting affidavit in light of the fourth amendment protection against unreasonable searches and seizures⁹ and the exclusionary rule as set forth by the United States Supreme Court in *Mapp v. Ohio*.¹⁰

The court's concern was based on the concept in *Johnson v.*

7. In essence the court of appeal believed that the warrant must be entirely quashed since the magistrate may have decided the *Aguilar* test had not been met if he had been presented with all information. The court of appeal refused to add the excluded material and retest the affidavit's sufficiency in place of the original magistrate.

8. 28 Cal. 3d at 385-90, 618 P.2d at 219-22, 168 Cal. Rptr. at 673-76.

9. U.S. CONST. amend. IV. See *Franks v. Delaware*, 438 U.S. 154 (1978) (warrant is not invalid if warrant affidavit contains negligent misstatements); *United States v. Harris*, 403 U.S. 573 (1971) (informant statements against his penal interests enhances his credibility); *Whiteley v. Worden*, 401 U.S. 560 (1971) (defective affidavit may not be later salvaged by police testimony that they actually had additional facts); *Spinelli v. United States*, 393 U.S. 410 (1969) (explicit detail of informants tip may enhance his credibility); *McCray v. Illinois*, 386 U.S. 300 (1967) (informant's past experience may be considered to evaluate his credibility); *Aguilar v. Texas*, 378 U.S. 108 (1964) (established a two prong test for probable cause based on informant's tip); *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973) (warrant is invalid where it contains immaterial but deliberately false statements).

10. 367 U.S. 643 (1961). In order to deter unconstitutional behavior in the area of fourth amendment search and seizure, the United States Supreme Court held that any evidence seized pursuant to such an illegal search must be excluded at trial.

*State*¹¹ that a neutral magistrate should act as an intermediary between the public and the police officer engaged in the competitive enterprise of ferreting out crime. An affidavit which fails to fully disclose all material information removes the valuable inference-drawing ability from the magistrate and essentially vests it in the affiant. The court felt this failure to fully disclose greatly increased the chance that the defendant's rights may be invaded without sufficient probable cause.¹²

To insure that the magistrate's decision is based upon proper considerations, *Aguilar v. Texas*¹³ established a two-prong test to be employed when informants are used to demonstrate probable cause. First, the affidavit must establish the credibility of the informant. Credibility is shown by alleging information that the informant has been reliable in the past;¹⁴ the information given is against the informant's penal interest and may expose the informant to criminal liability;¹⁵ or the informant is a citizen-informant.¹⁶

Second, the affidavit must describe facts, not mere conclusionary statements, showing that the informant has a foundation on which to base his report. This requirement seeks to insure that the informant is not mistaken about what he has seen nor that he has drawn incorrect conclusions from his observations. The required descriptive facts usually consist of those concerning where and how the informant obtained his information.¹⁷ Information obtained by hearsay may present special problems and require a further showing of authenticity. Highly detailed information, rather than reliance on vague rumor, was accepted by the United

11. 333 U.S. 10, 13-14 (1948).

12. *Johnson* sought to insure that it was a neutral and fully informed magistrate that determined whether probable cause existed to justify a search. A police officer caught up in the excitement of the enterprise would not be neutral. Omissions that keep the magistrate from being fully informed circumvents his purpose as much as if he were deceived by affirmative misstatements.

13. 378 U.S. 108 (1964).

14. *People v. Dumas*, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973) (magistrate could reasonably conclude informant was reliable due to past reliability).

15. *United States v. Harris*, 403 U.S. 573 (1971) (informant's admission that he had bought contraband from defendant carried extra indicia of reliability since he had admitted he himself had broken the law); *Ming v. Superior Court*, 13 Cal. App. 3d 206, 91 Cal. Rptr. 477 (1970) (declaration against informant's penal interest increases likelihood of reliability).

16. An informant's testimony based solely on his desire to be a good citizen is presumed reliable. See *People v. Schulle*, 51 Cal. App. 3d 809, 129 Cal. Rptr. 585 (1975) (testimony of 14 year old girl who told police she saw marijuana in stepfather's bedroom was sufficient to establish probable cause); *People v. Scoma*, 71 Cal. 2d 332, 455 P.2d 419, 78 Cal. Rptr. 491 (1969) (informant may not be considered citizen informant where his penal interests are at stake); see note 43 *infra*.

17. See *People v. Hamilton*, 71 Cal. 2d 176, 179-80, 454 P.2d 681, 683, 77 Cal. Rptr. 785, 787 (1969) (the California Supreme Court essentially reiterates the two prong test of *Aguilar*).

States Supreme Court in *Spinelli v. United States*,¹⁸ as fulfilling *Aguilar's* second prong. Based on the *Aguilar* test, the defendant in *Kurland* challenged the warrant affidavit as being insufficient to establish the credibility of the informant.¹⁹ Lacking such establishment, it was asserted that the warrant should be quashed.

California had previously addressed the problem of the effect of a negligent misstatement within a supporting affidavit in *Theodor v. Superior Court of Orange County*.²⁰ The *Theodor* court believed that to allow the use of negligent misstatements would be tantamount to removing the effectiveness of the neutral magistrate. Rejecting the approach that all erroneous information must be excised from the affidavit whether reasonable or not,²¹ the court held that only negligent or unreasonable misstatements must be removed from the affidavit. The affidavit would then be retested for evidence of probable cause. Since deterrence was believed to be the purpose behind the exclusionary rule, the California Supreme Court did not feel the excision of reasonable but mistaken misstatements should be required since no deterrent purpose would be served.²²

In 1978, the California Supreme Court considered the problem of a warrant affidavit containing intentional or reckless misstate-

18. 393 U.S. 410 (1969). The decision allowed the use of additional corroborative evidence to support an informant's tip which by itself was insufficient. An example of the use of this idea may be seen in *Draper v. United States*, 358 U.S. 307 (1959), where a suspect, closely matching an informant's carefully detailed description, arrived at the designated location closely within the time frame asserted by the informant.

19. 28 Cal. 3d at 382-83, 618 P.2d at 217, 168 Cal. Rptr. at 671.

20. 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972). In *Theodor*, the court held that a negligent misstatement of informant's identity and his participation as a drug customer of the defendant will require the affidavit to be retested for probable cause after the misstatement was excised.

21. See Comment, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A. L. REV. 96 (1971). The author asserts that whether material omissions occur reasonably or negligently, they taint the magistrate's decision. Therefore, omissions of either type should be removed and the remainder of the affidavit retested. The *Theodor* court rejected this approach as being in violation of the principle of reasonableness which controls the application of the fourth amendment. Since probable cause, not certainty, is the test, reasonable material misstatements are allowed without sanction and only unreasonable misstatements are excised. 28 Cal. 3d at 385-88, 618 P.2d at 219-21, 168 Cal. Rptr. at 673-75.

22. The *Theodor* court rested its decision on both state and federal law. Subsequent to the *Theodor* decision, the United States Supreme Court held in *Franks v. Delaware*, 438 U.S. 159 (1978), that no sanctions would be imposed for negligent misstatements contained in a warrant affidavit. The fourth amendment only compels excision of those statements that are intentional or reckless.

ments in the case of *People v. Cook*.²³ The court held that the affidavit could not be separated from an intentional falsehood and then considered separately. Once the supporting affidavit has been found to contain deliberate misstatements, the court cannot excise the offending matter and presume the remaining statements to be true; the whole document must be considered tainted. As a result, the warrant must be automatically quashed and the products of any ensuing search excluded,²⁴ regardless of the effects of the intentionally false statements on the existence of probable cause. Only in this way may the deterrent purpose of the exclusionary rule be served.

Early California Supreme Court decisions were concerned with the effect of misstatements actually contained within the supporting affidavit. The court in *Theodor* had recognized the corresponding difficulties which might arise when an affidavit fails "to include information which might otherwise negate a finding of probable cause."²⁵ The California Court of Appeal had addressed the issue several times holding that an affidavit may be insufficient when it omits material facts adverse to the existence of probable cause.²⁶ The California Supreme Court, now directly faced with the issue in *People v. Kurland*, endorsed the holding of the lower courts.

23. 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978). In *Cook*, the defendant was arrested for manufacturing dangerous drugs. The warrant affidavit contained a number of intentional misstatements designed to elicit the magistrate's favorable decision. At the suppression hearing, the prosecution contended that the only remedy was to remove the misstatements and to retest the warrant. Upon such removal, the trial court found probable cause remained and upheld the warrant, disregarding the fact the misstatements had been included intentionally rather than negligently as in *Theodor*.

The United States Supreme Court, in *Franks v. Delaware*, 438 U.S. 154 (1978), held that intentional misstatements must only be excised from the warrant and the remainder retested for probable cause. As a result of *Cook*, California law will require the entire warrant to be automatically invalidated upon a showing of intent. Due to the change in federal law, the *Cook* decision was based solely on California precedents. See 22 Cal. 3d at 88, 583 P.2d at 141-42, 148 Cal. Rptr. at 616-17. Similarly, the *Kurland* decision is based exclusively on California law.

24. This would merely be the application of the exclusionary rule found in *Mapp v. Ohio*, 367 U.S. 343 (1961); see note 10 *supra*.

25. 8 Cal. 3d at 96 n.11, 501 P.2d at 247 n.11, 104 Cal. Rptr. at 239 n.11.

26. See, e.g., *People v. Neusom*, 76 Cal. App. 3d 534, 143 Cal. Rptr. 27 (1977) (information intentionally omitted from the warrant affidavit will cause the whole warrant to be quashed without regard to the omission's effect on probable cause); *Morris v. Superior Court*, 57 Cal. App. 3d 521, 129 Cal. Rptr. 238 (1976) (omitted fact is material if it could have negated the magistrate's finding of probable cause had it been included); *People v. Barger*, 40 Cal. App. 3d 662, 115 Cal. Rptr. 298 (1974) (where facts have been negligently omitted the warrant-affidavit must be retested).

III. CASE ANALYSIS

Just as the California Constitution²⁷ and the California Penal Code²⁸ allow a facially valid search warrant affidavit to be attacked on the ground that it contains misstatements, by judicial determination an affidavit may now be attacked on the basis that it fails to include material, adverse information pertinent to the existence of probable cause. This is based on the belief that "[t]he crucial inference-drawing powers of the magistrate may be equally hindered in either case, with identical consequences for innocent privacy."²⁹

A. *The Material Omission*

The court first considered what information must be disclosed by the affiant in an affidavit supporting a warrant. An important analytical distinction was noted between omissions and misstatements. "Every falsehood makes an affidavit inaccurate, but not all omissions do so."³⁰ Therefore, an affidavit need not include every imaginable fact regardless of its relevancy. Only those material facts which a reasonable magistrate would consider important in establishing the existence of probable cause must be included in an affidavit. Additionally, the materiality analysis should only be extended to those omissions which substantially interfere with the magistrate's ability to determine the existence of a need for the desired search.³¹ In defining materiality, the California Supreme Court held that facts are material and must be included if their omission would result in the affidavit being substantially

27. CAL. CONST. Art. 1, § 13. The court believed that the right to challenge a warrant is a derivation of the constitution's guarantee against unreasonable searches and seizures. 28 Cal. 3d at 383, 618 P.2d at 217, 168 Cal. Rptr. at 671.

28. CAL. PENAL CODE §§ 1538.5-1540 (West Supp. 1980). See note 2 *supra*.

29. 28 Cal. 3d at 384, 618 P.2d at 217-18, 168 Cal. Rptr. at 671-72. See Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 749 (1974). The author confronts the problem of the failure to find probable cause if hearsay evidence is used. The author also discusses the justification and abuses of hearsay evidence.

30. 28 Cal. 3d at 384, 618 P.2d at 218, 168 Cal. Rptr. at 672.

31. The court relied on the discussion of materiality found in *Morris v. Superior Court*, 57 Cal. App. 3d 521, 129 Cal. Rptr. 238 (1976). Omitted facts may be deemed material if "the magistrate's inference drawing ability is interfered with substantially," or if they "could have had an adverse effect upon the normal inference drawing process of the magistrate," or could have negated the magistrate's finding of probable cause, or might have caused the magistrate to find an informant "unreliable and his information untrustworthy." 57 Cal. App. 3d at 524-27, 129 Cal. Rptr. at 240-42.

misleading.³²

Once it has been established that a material or relevant fact has been omitted from the warrant affidavit, the effect upon the affidavit as a whole will depend on the affiant's motivation in withholding the pertinent information.

B. Remedies for Material Omission

Just as *Theodor* and *Cook* describe misstatements as reasonable, negligent, and intentional, the California Supreme Court wished to similarly classify omissions and apply the exclusionary rule accordingly. The subtle differences between an affirmative misstatement and a material omission necessitates some modification of the remedies for misstatement as found in *Theodor* and *Cook*.³³

Although it is possible that a reasonable but wrongful material omission would taint the affidavit thus requiring some adjustment, the court did not agree; reasonable omissions were not held fatal to the affidavit.³⁴ The possibility of a wrongful invasion of privacy was not considered; only the deterrence factor was considered to be important.³⁵ "A material omission is reasonable

32. Although a positive duty to disclose facts does exist, the duty only extends to material or relevant adverse facts. *People v. Barger*, 40 Cal. App. 3d 662, 115 Cal. Rptr. 298 (1974), see generally *People v. Neusom*, 76 Cal. App. 3d 534, 143 Cal. Rptr. 27 (1977) (failure to skin-search an informant prior to a narcotics buy was insignificant where his reliability had been established by prior reliability and admissions against his penal interests); *Morris v. Superior Court*, 57 Cal. App. 3d 521, 129 Cal. Rptr. 238 (1976) (police efforts to create reliability of informant is material and may not be omitted); *People v. Barger*, 40 Cal. App. 3d 662, 115 Cal. Rptr. 298 (1974) (fact that informant had rescinded his statement in affidavit may be deemed material); *People v. Webb*, 36 Cal. App. 3d 460, 111 Cal. Rptr. 524 (1973) (the magistrate does not need to be presented with the precise nature of informant's criminal record to be put on notice of his possible unreliability).

33. Of course, "misstatement" and "omission" are not equally opposite terms. "Misstatement" is essentially conceived of as a wrongfully made affirmative statement. "Omission" merely means *not included* and does not carry the same negative connotation as "misstatement." The court went out of its way to define wrongful omission or misomission. Once defined and discovered, the remedy for misstatement and misomission are essentially the same. See note 41 *infra*.

34. Comment, *supra* note 21, at 143-45. The author contends that when the affiant errs and the probable cause ruling relies on the erroneous information within the affidavit, the privacy guarding function of the magistrate is seriously diminished, even if the error is unintentional. Use of the exclusionary rule seems necessary to deter such errors, even if innocent. The exclusionary rule's purpose was also to uphold the integrity of the judicial system. Since efforts to determine an affiant's prior state of mind are too imprecise and difficult, the *Kurland* holding may serve to create a smokescreen that is difficult to penetrate.

35. 28 Cal. 3d at 386-87, 618 P.2d at 219, 168 Cal. Rptr. at 673. The court relied strongly on the *Cook* and *Theodor* decisions. It was noted that *Cook* had reaffirmed *Theodor's* "rule of reason" in holding that the exclusionary doctrine developed in *Theodor* was intended to minimize the risk that privacy may wrongfully be invaded by means of deterring unlawful police conduct. It was believed that if the

when despite the exercise of due care, [the] affiant was ignorant of the omitted fact or forgot to include it, or his conclusion that it was privileged or immaterial was reasonable even if incorrect."³⁶ The court reasoned that since the affiant believes that he has done all that is necessary to comply with the law, modifying the affidavit to include the reasonable omission will have little deterrent effect.

An unreasonable or negligent omission arises "when the affiant is unreasonably ignorant of facts, unreasonably forgets to include them, or makes a good faith but unreasonable decision that they need not or should not be included."³⁷ To deal with this unreasonable omission, the court adopted the "add and retest" formula. The court would add the omitted material to the affidavit and then test the affidavit again for probable cause.³⁸ Recognizing the balance of the affidavit with the addition of the negligently omitted material would serve to reward the affiant's good faith effort at accuracy.³⁹

However, the intentional omission received somewhat different treatment than the case of a material misstatement.⁴⁰ An omission did not damage the validity of a warrant affidavit merely because it was intentionally withheld. There must be demonstrated, not merely an intent to withhold, but an intent to mislead by withholding. An omission of this type was viewed by the court to be no different than a reckless falsehood or deliberate lie and should require harsh deterrence under the rationale of the *People*

affidavit reflects a reasonable attempt at truth, constitutional principles are satisfied and the deterrent purpose would not be served by quashing the warrant, "no matter how crucial the inaccuracy."

36. 28 Cal. 3d at 388, 618 P.2d at 220, 168 Cal. Rptr. at 674.

37. *Id.*

38. The "add and retest" formula was conceived in the cases of *Barger*, *Morris*, and *Neusom*. See note 26 *supra* and accompanying text.

39. The majority noted the thoughts of Chief Justice Bird in her dissent that, as with intentional misstatements, deliberate omissions of material fact which should have reasonably been included undermine the magistrate's finding that the affiant was credible and will serve to deprive any reviewing court of a "reliable factual basis" to redetermine probable cause. Since a reviewing court may not merely assume the magistrate would still have found probable cause, had he known of the negligent omission, an affidavit materially incomplete due to an affiant's negligence should never support a decision to uphold the warrant. The majority regarded this viewpoint by noting that such considerations fail to consider the precedents of *Cook* and *Theodor*. 28 Cal. 3d at 388, 618 P.2d at 220, 168 Cal. Rptr. at 674.

40. See note 33 *supra*.

*v. Cook*⁴¹ decision. Therefore, the California Supreme Court believed that the appropriate response was to quash the warrant since it contained a deliberate misleading omission that was ultimately deemed material.⁴²

Under the test established by *Kurland* it may appear that all details of an anonymous informant's criminal history must be disclosed in order to avoid the creation of a misleading impression regarding the informant's credibility and reliability. However, the apparently strict test does not force such a conclusion. As long as the magistrate is put on notice that the affiant does not wish to claim that the informant enjoys the status of a citizen-informant⁴³ and is presented with other sufficient facts establishing general credibility, a detailed criminal history need not be included. In such a case, the omission of an informant's criminal record is simply not material.

IV. CASE IMPACT

Although *People v. Kurland* presented the California Supreme Court with a matter of first impression, the concepts recognized by the court's decision are not new to California. The *Kurland*

41. 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978). In applying *Cook's* rationale concerning intentional misstatements to situations where deliberate wrongful omissions are present, the court noted the appropriate remedy is to vitiate the entire warrant since none of the remainder may be trusted. Any deliberate attempt to mislead the magistrate was believed to undermine the judicial process and render the entire affidavit suspect. The only possible remedy would be to render the warrant a nullity.

The California Supreme Court wished to save this harsh remedy for use in situations of intentional wrongful omissions and not employ it where mere negligence may be shown. The court believed that to apply the exclusionary doctrine so harshly would tend to encourage intentional omissions, since an officer-affiant may become frustrated and feel he has "nothing to lose" if his omissions were found either negligent or intentional. 28 Cal. 3d at 390, 618 P.2d at 221-22, 168 Cal. Rptr. at 675-76.

42. It is important to note that under the intentional misstatement situation, "materiality" is not given the importance it was given in *Kurland*. Although every misstatement affects the accuracy of the warrant, not all omissions do. Therefore, the court adopted a threshold test of materiality prior to employing any remedies where omissions are shown. It was noted that although *Theodor* and *Cook* do not apply any version of this two-step test, they also do not preclude its use. 28 Cal. 3d at 389 n.7, 618 P.2d at 221 n.7, 168 Cal. Rptr. at 675 n.7.

43. The *Aguilar* rule does not apply to information from disinterested citizens who report criminal activity responding to their civic duty. Such citizen-informants are presumed reliable. See *People v. Smith*, 17 Cal. 3d 845, 553 P.2d 557, 132 Cal. Rptr. 397 (1976) (affidavit must affirmatively establish citizen-informant status); *People v. Ramey*, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976) (citizen-informant must still satisfy magistrate that he is correct in his beliefs). The distinction between citizen informants and "criminal" informants is based on the idea that criminal-informants "are generally motivated by something other than good citizenship." *People v. Schulle*, 51 Cal. App. 3d 809, 815, 124 Cal. Rptr. 585, 588 (1975). See note 16 *supra*.

decision recognizes the law regarding material omissions that has been established by various decisions of the court of appeal.⁴⁴

The *Kurland* decision clarifies and solidifies previous decisions providing clear-cut tests to be employed when a material omission is found.⁴⁵ However, these tests may prove difficult to use and the corresponding remedies may provide inadequate protection of privacy.⁴⁶

As noted by Chief Justice Bird in her dissent,⁴⁷ the effect of the *Kurland* decision will likely encourage the police to withhold material facts adverse to the warrant application. A policy likely to be adopted is "if in doubt, omit."⁴⁸ Therefore, information reasonably omitted will not affect the warrants validity and will not be subject to appellate review since the appellate court may not substitute its judgment for that of the presiding magistrate.⁴⁹

If the omitted material is subsequently found to be unreasonably withheld, it is merely added and retested as if it had been present from the outset. "Thus, the majority would allow a warrant to stand even though the affidavit on which it is based was

44. See note 26 *supra*.

45. The *Kurland* decision used the various tests established in *Barger*, *Neusom*, and *Morris* (see note 26 *supra*) and the tests regarding misstatements in *Theodor* and *Cook* thereby synthesizing the three situations of material omission in one opinion. The *Kurland* decision serves as a "California handbook" on the law regarding omissions from warrant affidavits. 28 Cal. 3d at 386-91, 618 P.2d at 219-22, 168 Cal. Rptr. at 673-77.

46. See note 34 *supra*. In addition to the fact that the motivation behind an omission may be very difficult to discover, there remains the problem of remedies to citizens whose privacy is wrongfully invaded. As Justice Douglas noted in his concurrence in *Mapp v. Ohio*, 367 U.S. at 670, civil "trespass actions against police officers who make unlawful searches and seizures are mainly illusory remedies," as are departmental sanctions. With the increased likelihood of warrants being upheld despite omissions of a material fact, a private individual's privacy may be further compromised.

47. 28 Cal. 3d at 396, 399-400, 618 P.2d at 226-28, 168 Cal. Rptr. at 680-82 (Bird, C.J., dissenting).

48. An officer may believe that his chances of obtaining a search warrant are slim if he includes certain information, therefore, he omits the information. If later his omission is found material and deliberate the warrant is quashed and any evidence seized is suppressed, the very result the officer feared if he included the information initially. If his omission is found to be a result of negligence, it is merely added and retested; thus, the officer has lost nothing. If the omission is found to be reasonable, the warrant stands. Therefore, where an officer is in doubt about certain information, his inclinations may be to exclude the material. Deterrence does not seem to be effective here.

49. *People v. Cook*, 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978) (citing *Skelton v. Superior Court*, 1 Cal. 3d 144, 460 P.2d 485, 81 Cal. Rptr. 613 (1969)) (credibility of witness must be judged by magistrate not by appellate court).

'substantially misleading' unless the 'unreasonably' withheld facts would have *necessarily precluded* a finding of probable cause."⁵⁰ The dilemma within the "add and retest" concept is that it is impossible for a reviewing court to know how the magistrate would have decided had he been aware of the material omission.⁵¹ When facts are unreasonably withheld, then later added by the reviewing court which then retests the affidavit, the result is that reviewing courts become the effective issuers of warrants.

Greater invasion of privacy is likely to result where affidavits are not quashed despite negligent omissions. An affiant may unreasonably withhold material facts, a search warrant may be issued, and a later retest may show that the affidavit was not supported by probable cause. In spite of this situation, the unconstitutional invasion has already occurred. The goal of deterring unconstitutional invasions of privacy is not promoted, it is actually hindered.⁵²

It may be argued that this sort of occurrence will be prevented by the requirement of automatically quashing the warrant where misleading intent can be shown. This remedy, however, appears illusory since there is great difficulty in proving the requisite intent to deceive. The court would be required to enter into the nebulous endeavor of discovering the affiant's state of mind.⁵³ Little or no concrete proof would be available, as opposed to the case of the affirmative misstatement. The affirmative misstatement exists on the face of the affidavit which itself serves as evidence; therefore, its truth or falsity can be more readily established, as can the affiant's intent. In contrast, the omission may be more easily justified than the misstatement. If the omission is unreasonable, only inclusion and reevaluation will be required. *Kurland* may thereby encourage vague affidavits. It appears the dishonest affiant has little to lose and much to gain, especially if he is accomplished at feigning ignorance.

Tests that encourage inclusion of facts upon doubt rather than their exclusion would be more in keeping with federal mandates. The United States Constitution entrusts the citizen's right to pri-

50. 28 Cal. 3d at 400, 618 P.2d at 228, 168 Cal. Rptr. at 682. (citations omitted) (emphasis added).

51. See note 49 *supra* and accompanying text.

52. As shown in note 46 *supra*, civil remedies may be of little value to the offended citizen. The likelihood of vexatious lawsuits being filed by bona fide offenders to hinder police efforts and the inability of officers to adequately compensate those truly wronged render this type of remedy of little use.

53. See Comment, *supra* note 21, at 145. The author notes the great difficulty in attempting to determine the prior state of mind of the affiant. The *Kurland* majority also admits that showing purposeful deception may be a difficult burden, but not one that cannot be accomplished.

vacy to an independent and fully informed magistrate,⁵⁴ not in a later reviewing court that must adjust warrants with remedies that stretch constitutional requirements.⁵⁵

V. CONCLUSION

The California Supreme Court has utilized decisions from the court of appeal in order to deal with the problem of a facially sufficient warrant affidavit being challenged as incomplete due to material omissions. The court has recognized that the omission must first be examined for materiality, and if found material, then the cause for its omission must be analyzed. If material facts were omitted innocently and reasonably, no sanction is imposed since no deterrent purpose would be served. If the omission was a result of negligence or unreasonableness, the omitted material will be added and the affidavit retested for probable cause. In this manner deterrence is maintained while rewarding good faith. If the material information is deliberately withheld with intent to mislead, the warrant must automatically be quashed in order to insure deterrence and to preserve the integrity of the criminal justice system.

The *Kurland* holding points toward an increased likelihood of deceptive omissions, since affiants may be more likely to withhold information when in doubt of its requisite inclusion. The final result is that constitutional protections entrusted to a neutral magistrate are severely curtailed. The risk of warrants being issued by magistrates without first being fully informed has grown significantly with the decision of *People v. Kurland*.

54. *Johnson v. State*, 333 U.S. 10 (1948) (designated neutral magistrate as the proper guardian of a citizen's privacy).

55. Chief Justice Bird asserts that the test formulated by the majority which would allow negligently omitted information to be added and the affidavit retested, even though the initial affidavit was substantially misleading to the magistrate, is a "legal fiction . . . too far removed from reality to be indulged in at the expense of the Fourth Amendment. Under this scheme, there will never be any informed weighing of all the relevant facts known to the police by a neutral and detached magistrate" as required by both federal and state constitutions. 28 Cal. 3d at 400, 618 P.2d at 228, 168 Cal. Rptr. at 682 (Bird, C.J., dissenting).

B. CRIMINAL PROCEDURE

1. *Speedy Trial Under California Penal Code Section 1382: Owens v. Superior Court*

The California Supreme Court in *Owens v. Superior Court*,¹ disregarded precedent² by holding that the sixty day statutory period mandated for initiating a speedy trial was not to be decreased by the amount of time a criminal defendant receives in continuances.³ Previously, any delay caused by the defendant would stay the running of the sixty day period.⁴ Under section 1382 of the California Penal Code,⁵ a criminal defendant may then demand a trial after the sixty day period expires. A trial must then be forthcoming within ten days or all charges against the defendant are dismissed.⁶ Contrary to prior law,⁷ the Supreme

1. 28 Cal. 3d 238, 617 P.2d 1098, 168 Cal. Rptr. 466 (1980). Defendant was charged with two counts of robbery and pleaded not guilty at arraignment. At defendant's request, the trial date was set beyond the 60 day period required by statute for a speedy trial. On the day set for trial, defense counsel was prepared but the prosecution was not, claiming inability to locate the victims of the robbery. Trial was ultimately set for January 22, the last day within the 10 day grace period, but did not actually begin until January 23.

2. See *People v. Conway*, 271 Cal. App. 2d 15, 76 Cal. Rptr. 251 (1969); *People v. Flores*, 262 Cal. App. 2d 313, 68 Cal. Rptr. 669 (1968); *People v. Burch*, 196 Cal. App. 2d 754, 17 Cal. Rptr. 102 (1961); *People v. Harrison*, 182 Cal. App. 2d 758, 6 Cal. Rptr. 345 (1960); *People v. Martinelli*, 118 Cal. App. 2d 94, 257 P.2d 37 (1953); *People v. Peter*, 20 Cal. App. 151, 128 P. 415 (1912).

3. The *Owens* court interpreted the statute involved as requiring only a 60 day period within which a speedy trial could be brought. As soon thereafter, if defendant had caused the delay, as defendant was prepared to go to trial, the prosecution would be required to commence such trial within the 10 day grace period given them. After the expiration of the grace period, charges must be dismissed in the absence of a showing of good cause for the delay. See *Owens v. Superior Court*, 28 Cal. 3d at 248-49.

4. This was done on a purely mechanical basis. If, for example, the trial began 100 days after an information was filed and the court determined that the defendant caused 60 days of such delay, the court would then deduct the 60 days from the 100 days to end up with 40 days, thus within the 60 day statutory limit. See, e.g., *People v. Harrison*, 182 Cal. App. 2d 278, 759, 6 Cal. Rptr. 345, 345 (1960).

5. The statute states, in pertinent part:

The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:

2. When a defendant is not brought to trial in a Superior Court within 60 days after the finding of the indictment or filing of the information or, in case the cause is to be tried again following a mistrial, an order granting a new trial again from which an appeal is not taken, or an appeal from the Superior Court, within 60 days after such mistrial has been declared, after entry of the order granting the new trial, or after the filing of the remittitur in the trial court . . . ; except that an action shall not be dismissed under this subdivision if it is set for trial on a date beyond the 60 day period at the request of the defendant or with his consent, express or implied, or because of his neglect or failure to appear and if the defendant is brought to trial on the date so set for trial or within 10 days thereafter.

Cal. Pen. Code § 1382.

6. See note 4 *supra* and accompanying text.

7. See note 1 *supra* and accompanying text.

Court in *Owens* held that the sixty day period excluded the possibility of considering defendant's continuances since state interest was sufficiently protected by allowing the prosecution sixty days in which to prepare its case. Legislative intent was proffered as a major reason for this interpretation.⁸

2. Prior Admissions: *People v. Hall*

In *People v. Hall*,¹ the Supreme Court impliedly overruled prior inconsistent cases² by "disapproving" of the admission in evidence of a prior conviction when an ex-felon is charged for a crime of possession.³ The court concluded that a prior felony conviction could *not* be given to the jury if the accused stipulates to the prior conviction *unless* the state can clearly demonstrate that its exclusion will legitimately impair the prosecution's case or preclude the presentation of alternative theories of guilt.⁴ How-

8. 28 Cal. 3d at 244-46, 617 P.2d at 1101-03, 168 Cal. Rptr. 66 at 469-71.

1. 28 Cal. 3d 143, 616 P.2d 826, 166 Cal. Rptr. 578 (1980).

2. The court cites the following cases as being "disapproved" of to the extent that they are inconsistent with *Hall*: *People v. Jackson*, 53 Cal. 2d 89, 346 P.2d 389 (1959); *People v. Gross*, 105 Cal. App. 3d 542, 166 Cal. Rptr. 1 (1980); *People v. Piper*, 103 Cal. App. 3d 102, 162 Cal. Rptr. 833 (1980); *People v. Black*, 96 Cal. App. 3d 846, 158 Cal. Rptr. 449 (1979); *People v. Morrison*, 67 Cal. App. 3d 425, 136 Cal. Rptr. 650 (1977); *People v. Faulkner*, 28 Cal. App. 3d 384, 104 Cal. Rptr. 625 (1972); *People v. Gallinger*, 212 Cal. App. 2d 851, 28 Cal. Rptr. 472 (1963); *People v. Davenport*, 210 Cal. App. 335, 26 Cal. Rptr. 753 (1962); *People v. Garrow*, 130 Cal. App. 2d 75, 278 P.2d 475 (1955); *People v. Domenico*, 121 Cal. App. 2d 124, 263 P.2d 122 (1953); *People v. Israel*, 91 Cal. App. 2d 773, 206 P.2d 62 (1949); *People v. Hudging*, 59 Cal. App. 2d 175, 138 P.2d 311 (1943); *People v. Schunke*, 47 Cal. App. 2d 542, 118 P.2d 314 (1941); *People v. McFarlan*, 126 Cal. App. 777, 14 P.2d 1066 (1932); *People v. Forrester*, 116 Cal. App. 240, 2 P.2d 558 (1931). *Hall*, 28 Cal. 3d 143, 156 n.8, 616 P.2d 826, 833, 167 Cal. Rptr. 844, 851 (1980).

3. The court felt compelled to rule that a prior felony conviction may not be given to a jury if the accused stipulates to it in order to avoid any prejudice by the jury which might result from this knowledge. *See, e.g.*, *People v. Beagle*, 6 Cal. 3d 441, 451-54, 99 Cal. Rptr. 313, 318-21, 492 P.2d 1, 6-9 (1972). The court also noted that a stipulation to a prior conviction when admitted in evidence "relieves" the prosecution of the burden of proving the existence of a valid prior conviction beyond a "reasonable doubt" and "involves the partial waiver of significant constitutional rights." 28 Cal. 3d at 157 n.9, 616 P.2d at 834, 167 Cal. Rptr. at 852. The court pointed to the similarity of the prejudice and constitutional characteristics of the admission of the stipulation for this purpose and that of the admission for enhancement purposes, *see e.g.*, *In re Yurko*, 10 Cal. 3d 857, 519 P.2d 516, 112 Cal. Rptr. 513 (1974), and the submission of a case for decision on the basis of a preliminary learning transcript, *see, e.g.*, *Bunnell v. Superior Court*, 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975).

4. Under this exemption, the evidence of the prior felony conviction will have

ever, admission of a prior conviction where the exception does not apply will not be reversible error if there is sufficient independent evidence to prove that the defendant was guilty of a possession crime.⁵

C. FIRST AMENDMENT

1. *Ordinances Regulating Arcades: People v. Wheatly Glaze*

The significance of *People v. Wheatly Glaze*,¹ lies in its clarification of how a municipality may regulate a business enterprise in which first amendment activity is involved.² The operation of a

retained some probative value beyond proving the fact of felony status as an element of the charge. An example of this would be where the evidence is relevant to an issue not covered by the stipulation, *see, e.g.*, *People v. Maler*, 23 Cal. App. 3d 973, 100 Cal. Rptr. 650 (1972); *Martin v. Miqueu*, 37 Cal. App. 2d 133, 98 P.2d 816 (1940). *See also*, *People v. McClellan*, 71 Cal. 2d 793, 457 P.2d 871, 80 Cal. Rptr. 31 (1969) (stipulation admissible where it forces prosecution to elect between theories of guilt or hampers the presentation of remaining issues); *Fuentes v. Tucker*, 31 Cal. 2d 1, 187 P.2d 752 (1947) (admissible where ambiguous in form, limited in scope or used to deprive an opponent of the legitimate force and effect of material evidence).

However, proof as to the *nature* of the felony is irrelevant to this charge since any felony conviction establishes felony status. 28 Cal. 3d at 153, 616 P.2d at 831, 167 Cal. Rptr. at 849.

Also, where the stipulation to the possession charge is conditioned upon a jury finding that the defendant "used" the firearm, the prior felony conviction is irrelevant since if the defendant used it, he must have also possessed it. 28 Cal. 3d at 155, 616 P.2d at 833, 167 Cal. Rptr. at 851.

5. Where there is sufficient independent evidence to convict, the error could not have been prejudicial because for the amount of evidence required under this standard, there could be no reasonable probability that the jury would have reached a different result if the prior conviction had not been admitted. 28 Cal. 3d at 158, 160, 616 P.2d at 834, 836, 167 Cal. Rptr. at 852, 854. *See*, *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243, 255 (1956).

1. 27 Cal. 3d 841, 614 P.2d 291, 166 Cal. Rptr. 859 (1980). Appellant Glaze was charged with a violation of Los Angeles Municipal Code section 103.101(g) which provides that "[e]ach picture arcade must remain closed between the hours of 2:00 a.m. and 9:00 a.m. and customers, patrons and visitors must be excluded from the premises between these hours." The ordinance also provides that if there is only one coin operated movieola and it is not the primary business, customers need not be excluded during the otherwise imposed closing hours. The city contended that the closing of picture arcades is a constitutional exercise of its police powers because the closing helps prevent masturbation during those hours when law enforcement problems are greatest.

2. A municipality has the general power to regulate commercial businesses where the regulation is reasonable and non-discriminatory. *See Burton v. Municipal Court*, 68 Cal. 2d 684, 441 P.2d 281, 68 Cal. Rptr. 721 (1968), in which it was held that motion picture exhibitors are not immune from all restraint in pursuit of their occupation, which, as an economic enterprise, is subject to reasonable municipal regulation. *See also*, *Antonello v. San Diego*, 16 Cal. App. 3d 161, 93 Cal. Rptr. 820 (1971). So long as a relationship between the regulations of the public health, safety, and welfare exists, the regulation will be considered reasonable. A different test is used if the ordinance is not uniformly applicable to all commercial enter-

picture arcade has been held to be an activity which is protected by the first amendment³ and as such requires special consideration when it is to be regulated. 61A3C provides a two step approach.

First, the ordinance must be directly aimed at the evil being attacked⁴ (in this case masturbation in public places). Secondly, the ordinance must find the least restrictive means necessary to regulate the activity.⁵ An approach which allows for no distinction between picture arcades that show sexually explicit films and those that show Mickey Mouse cartoons is overbroad.⁶ The case

prises. For example, where the ordinance *singles out* for regulation a First Amendment protected activity, the ordinance must be content neutral. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

3. *EWAP, Inc. v. City of Los Angeles*, 97 Cal. App. 3d 179, 158 Cal. Rptr. 579, (1979). The court also stated that a city ordinance prohibiting concealed booths in picture arcades was a reasonable exercise of the city's police power. The ordinance requiring that the interior of the booths be visible did not restrict any rights of freedom of expression; *Perrine v. Municipal Court*, 5 Cal. 3d 656, 488 P.2d 648, 97 Cal. Rptr. 320 (1971). Denial of a license which would prohibit an activity protected by the first amendment, even under a narrowly drawn ordinance, could only be justified if granting the license constituted a clear and present danger of a serious substantive evil.

4. In first amendment jurisprudence, "[p]recision of regulation must be the touchstone. . . ." *N.A.A.C.P. v. Button* 371 U.S. 415, 438 (1963). See also *STONE, Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. Chi. L. Rev. 81, 111-12.

5. *People v. Wheatly Glaze*, 27 Cal. 3d 841, 848, 614 P.2d 291, 296, 166 Cal. Rptr. 859, 864 (1980). See *SALA v. New York*, 334 U.S. 558, 562 (1948) (A city ordinance was found invalid as infringing the right of free speech in the absence of any standards prescribing the exercise of police powers by the chief of police); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (A limitation on the use of sound equipment emitting loud and raucous noises upheld). See also, *Pryor v. Municipal Court*, 25 Cal.3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979); *Wollam v. City of Palm Springs*, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963).

6. 27 Cal.3d at 849, 614 P.2d at —, 166 Cal. Rptr. at —.

"[t]he government assumes that because masturbation has occurred at some picture arcades in the past, it is necessary to restrict the hours of *all* such business in the future. The ordinance fails to regulate only those arcades that have been or are likely to be havens for masturbation. . . . Such an undifferentiated approach is not sufficient to limit the right to free expression."

People v. Wheatly Glaze 27 Cal. 3d 841, 849, 614 P.2d 291, 166 Cal. Rptr. 859 (1980). See, *Tinker v. Des Moines School Dist.* 393 U.S. 503, 508 (1969) (undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom); *Police Dept. of Chicago v. Mosely* 408 U.S. 92, 101 (1972) (the equal protection clause requires that statutes affecting first amendment interests be narrowly tailored to their legitimate objectives; *Cohen v. California* 403 U.S. 15, 23 (1971). There may be some persons about which such lawless and violent proclivities, but it is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident

more clearly specifies the necessity of dealing directly with objectionable conduct.⁷

II. TORTS

A. Negligent Infliction of Emotional Distress

1. *Physical Injury Not Required: Molien v. Kaiser Foundation Hospital*

The recent case of Molien v. Kaiser Foundation Hospital¹ held that a cause of action for negligent infliction of severe emotional distress need not be accompanied by physical injury and that recovery for loss of consortium may be predicated upon either debilitating physical or mental injury.

I. INTRODUCTION

The California Supreme Court was called upon in *Molien* to determine whether it should allow recovery of damages for the negligent infliction of emotional distress absent accompanying physical injury. The action was brought by a husband against a doctor and a hospital for negligent infliction of emotional distress and loss of consortium arising out of an erroneous diagnosis of his wife as having contracted syphilis.² Subsequent testing revealed that the plaintiff did not have venereal disease; however, hostility arose between the spouses due to suspicion of extra marital affairs which finally resulted in the initiation of divorce proceedings. The couple also incurred large expenses for extensive counseling in an attempt to save the marriage.

The court held that the unqualified requirement of physical in-

views into avoiding particular forms of expression; *EWAP, Inc. v. City of Los Angeles* 97 Cal. App. 3d 179, 187, 158 Cal. Rptr. 579 (1979) (the city tried to rid itself of undesirable establishments by creating a system of restraint based on past convictions, rather than individual conduct, without showing such an individual with such a record would present a clear and present danger of a serious and substantive evil); *People ex rel. Busch v. Projection Room Theater* 17 Cal. 3d 42, 59, 550 P.2d 600, 130 Cal. Rptr. 328 (1976) (abatement must be directed to particular books or films which have been adjudged obscene rather than against the premises in which the material is sold).

7. *People v. Wheatly Glaze* 27 Cal. 3d 841, 849, 614 P.2d 291, 166 Cal. Rptr. 859 (1980). "Even if the First Amendment activity which the government seeks to regulate is of little value, the regulation must be necessary and it must focus narrowly on the abuse sought to be remedied." *Id.*

1. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

2. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 837. Plaintiff's wife was also required to undergo treatment for syphilis including the injection and administration of massive doses of penicillin. She alleged to have suffered "injury to her body and injury to her nervous system" as a result. *Id.*

jury, to which a claim for negligently inflicted emotional distress usually attaches, was no longer essential.³ Under the newly announced rule, the plaintiff had alleged sufficient facts to withstand the defendant's general demurrer. Further, the court found that the risk of harm to the plaintiff was reasonably foreseeable by the defendant.⁴ A duty of care was, therefore, owed to the plaintiff to accurately diagnose his wife.⁵ The negligent examination of plaintiff's wife and the foreseeable consequences flowing therefrom, were external, objective, and verifiable events that served as a measure of the validity of the claim.⁶

The requisite standard of proof essential for the plaintiff to prevail on his claim was found to be a sufficient safeguard against false allegations of negligently inflicted emotional distress.⁷ In regard to the plaintiff's second cause of action for loss of consortium, the court held that psychological injuries could be just as disabling as physical injuries, resulting in nearly identical loss. The issue involved was held to be one of proof rather than the origin of the harm.⁸

Loss of consortium, only recently recognized in California, was held not to be limited to those situations where the plaintiff's spouse had suffered severe and permanent physical injury.⁹ In *Rodriguez v. Bethlehem Steel Corporation*,¹⁰ the case that established the viability of loss of consortium between spouses as a separate cause of action, the injured spouse was rendered completely and permanently paralyzed below his chest. The court held that it did not intend to restrict its ruling to those particu-

3. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

4. *Id.* at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35. The court states that in the case at bar the risk of harm to plaintiff was reasonably foreseeable to defendants. It is easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resultant emotional distress to a married patient's spouse; Dr. Kilbridge's advice to Mrs. Molien to have her husband examined for the disease confirms that plaintiff was a foreseeable victim of the negligent diagnosis.

Id.

5. *Id.* The court found that since the risk of harm was foreseeable, "that under these circumstances defendants owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife." *Id.*

6. *Id.* at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 834.

7. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

8. *Id.* at 932-33, 616 P.2d at 823, 167 Cal. Rptr. at 841.

9. *Id.* at 931-32, 616 P.2d at 822, 167 Cal. Rptr. at 840.

10. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

larly poignant facts.¹¹ Rather, the court stated that the test of whether or not the degree of harm suffered by the plaintiff's spouse is sufficient to warrant compensation for the tort is to be determined by the adequacy of the evidence adduced in the particular case. The injury's classification as psychological or physiological is not determinative.¹² Given the nature of the loss,¹³ the court found it to be more consistent to recognize the fact that one may become just as severely disabled mentally with the resulting loss and suffering to the plaintiff just as serious as if the impairment were of a purely physical nature.¹⁴

The court in *Molien* significantly extended liability for harm manifested solely by mental distress absent some other traditionally recognized guarantee of genuineness, such as accompanying physical injury. The court held that it is now the jury's responsibility to weed out the meritorious from the unmeritorious claims according to the proof presented concerning the harm suffered.¹⁵

II. HISTORICAL ANALYSIS

A. Emotional Distress

Courts have traditionally been reluctant to grant recovery for emotional distress even when inflicted intentionally. They have been even more hesitant when the claim has been for a distur-

11. *Id.* In *Rodriguez*, only 16 months after being married, the husband was struck on the head while at work by a falling pipe that weighed over 600 pounds. The blow severely damaged his spinal cord and left him completely paralyzed below his chest and partially paralyzed in one arm. The accident changed the plaintiff's husband from an active participant in the marriage to a lifelong invalid. The wife was forced to quit her job and devote 24 hours a day to her husband who required assistance in every activity of daily life. The wife had to awake at various hours of the night to turn her husband to avoid bedsores. She had to help him wash, dress, undress, and get in and out of his wheel chair every morning and evening. Additionally, as her husband had lost control over all bowel and bladder functions, she was required to assist in the trying process of artificially inducing these bodily functions.

12. 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

13. In *Rodriguez*, the court defined consortium as including factors such as conjugal society, comfort, affection, and companionship. An additional component recognized was the moral support that each spouse gives the other. 12 Cal. 3d at 405, 525 P.2d at 684, 115 Cal. Rptr. at 780.

14. 27 Cal. 3d at 932-33, 616 P.2d at 823, 167 Cal. Rptr. at 841.

15. See *Rodriguez v. State*, 52 Hawaii 156, 472 P.2d 509 (1970). The Supreme Court of Hawaii addressed the issue of negligent infliction of emotional distress as an independent tort and in holding that there existed a duty to refrain from such infliction stated that "[c]ourts which have administered claims of mental distress incident to an independent cause of action are just as competent to administer such claims when they are raised as an independent ground for damages." *Id.* at 172, 472 P.2d at 519. In *Molien*, the court, in holding that negligent infliction of emotional distress and loss of consortium do not require accompanying physical injury, cited the Hawaii court's reasoning. 27 Cal. 3d at 929-30, 933, 616 P.2d at 821, 823, 167 Cal. Rptr. at 839, 841.

bance negligently induced.¹⁶ Early reasons given for denial of such recovery were that such intangible damages could not be measured on a monetary basis,¹⁷ the consequences were too remote and thus not proximately caused by the defendant's acts,¹⁸ the fear of increased litigation,¹⁹ and the possibility of fraudulent

16. See *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 P. 320 (1896) (mental suffering alone will not support a claim for damages; it does constitute aggravation of physical harm if it naturally flows from the act complained of); *Sprogis v. Butler*, 40 Cal. App. 647, 181 P. 246 (1919) (plaintiff claimed injuries of a subjective nature which depended entirely upon his own testimony; the court had a special duty to thoroughly test the credibility and reliability of the plaintiff as a witness); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 54, at 327 (4th ed. 1971). Dean Prosser noted that the interest in freedom from mental distress has received relatively little protection as compared to the protection afforded pecuniary and property interests for various reasons. Courts had been reluctant to "recognize the interest in peace of mind, even where the interference with it is intentional. This reluctance has of course been more pronounced where the defendant's conduct is merely negligent." *Id.*

17. See *Ivnych v. Knight*, 11 Eng. Rep. 854 (1861) (mental suffering could not be redressed because of the difficulty of measuring such harm and placing a monetary value in it). See also Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 41 AM. L. REG., N.S. 141, 143 (1902). The author attributed the rule prohibiting recovery for emotional harm to the early rule holding that parties to an action were incompetent as witnesses because of their inherent interest in the action.

18. *Victorian Rvs. Comm'rs v. Coultas*, 13 App. Cas. 222 (P.S. 1888) (V.I.) (emotional harm is not proximately caused by defendant's actions). See also 27 Cal. 3d at 933-37, 616 P.2d at 823-26, 167 Cal. Rptr. at 841-44 (Clark, J., dissenting). The dissent in *Molien* appears to assert that social policy mandates limiting liability at a point short of that recognized by the majority. Since proximate cause is basically a legal limit placed on factual causation, the dissent contends that the limit should be placed where it was prior to *Molien*. Justice Clark warns against imposing new burdens on the court.

19. See 27 Cal. 3d at 937, 616 P.2d at 825, 167 Cal. Rptr. at 843. (Clark, J., dissenting) ("The author of today's majority opinion has properly cautioned against the imposition of new burdens on the courts"); *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In rejecting the rule denying recovery for emotional distress based upon fear of peril to a third person, the court found that it had previously rejected the argument that we must deny recovery upon a legitimate claim because other fraudulent ones may be urged and went on to point out that "courts are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely shows society's pressing need for legal redress." *Id.* at 735 n.3, 441 P.2d at 917 n.3, 69 Cal. Rptr. at 77 n.3. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 54, at 327 (4th ed. 1971). Prosser notes that:

[t]he same objections against allowing recovery have been advanced: it is said that mental disturbance cannot be measured in terms of money, and so cannot serve in itself as a basis for the action; that its physical consequences are too remote, and so not proximately caused, that there is a lack of precedent, and that a vast increase in litigation would follow.

Id. See *Throckmorton, Damages for Fright*, 34 HARV. L. REV. 260 (1921). "Most valid objection to the protection of such interest lies in the 'wide door' which

claims.²⁰ These reasons were advanced whether or not the plaintiff had additionally sustained physical harm.

Modernly, the issue is whether a claim for negligently inflicted emotional distress can be maintained, absent physical impact, like a claim for intentional infliction of emotional distress.²¹

The requirement that negligently inflicted emotional distress either be accompanied by physical injury, result in physical harm, or be intentionally inflicted, was to insure the genuineness of the claim.²² The fear of false recovery for emotional distress has been the most often cited reason for denying such claims.²³

In California, damages for emotional distress were established as parasitic to a recognized tort in the 1896 case of *Sloane v. Southern California Railroad Company*.²⁴ There it was held that "mental suffering constitutes an aggravation of damages when it naturally ensues from the injury now complained of," but of itself, would not sustain a right to relief.²⁵ However, the same court in *Sloane* ultimately found that a nervous disorder was a physiological, and not a psychological injury. It noted that "the interdependence of mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each

might be opened, not only to fictitious claims but to litigation in the field of trivialities and bad manners." *Id.* at 276.

20. See note 19 *supra*. The arguments against recognizing a right to recover for emotional distress in the fear of feigned claims and the increase in litigation generally, consisting both of fraudulent and perhaps valid claims, are often stated together. *But see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12. (4th ed. 1971). Dean Prosser states:

[s]o far as distinguishing true claims from false ones is concerned, what is required is rather, a careful scrutiny of the evidence supporting the claim and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law.

Id. at 51.

21. See *State Rubbish Collectors' Assn. v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). Intentional infliction of severe emotional distress was recognized as an independent tort that would support a claim for damages. Extreme and outrageous conduct associated with an intentional act was held to insure that a claim of emotional harm would be genuine.

22. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (independent cause of action against an insurer for damages when it refused to settle a claim against the insured within the limits of policy served as a guarantee of genuineness sufficient to permit the plaintiff to recover for the emotional disturbance as well as the excess judgment); *Vanoni v. Western Airlines, Inc.*, 247 Cal. App. 2d 793, 46 Cal. Rptr. 115 (1967) (allegations that plaintiffs suffered severe shock to their nerves and nervous systems was sufficient to state a physical injury to withstand a general demurrer). See note 21 *supra*.

23. See notes 19-20 *supra*; 27 Cal. 3d at 925-26, 616 P.2d at 818, 167 Cal. Rptr. at 836.

24. 111 Cal. 668, 44 P. 320 (1896). See note 16 *supra* and accompanying text.

25. *Id.* at 680, 44 P. at 322.

other."²⁶

Subsequent cases followed the rule laid down in *Sloane* and held that actionable mental suffering results only when a person, through negligence suffers "injury by physical impact or by shock, through the senses, to the nervous system and damages for physical injuries may be supplemented with damages for mental suffering."²⁷ The court in *Espinosa v. Beverly Hospital*,²⁸ for example, distinguished emotional distress resulting when plaintiffs were given the wrong baby as being negligently inflicted and, thus, not capable of being sustained as an independent tort. The court in *Espinosa* clearly indicated that some physical manifestation was required to maintain the action, whether it resulted from the emotional injury or was incidental to it. However, the court did find that "the human body can through negligence of others suffer injury . . . by shock, through the senses, to the nervous system . . . and a shock to the nervous system is an injury to the body rather than to the mind."²⁹

The case of *Vanoni v. Western Airlines*³⁰ in 1967 relied on the earlier decisions of *Sloane* and *Espinosa* in finding that the negligent acts of the defendant airline and its agents in indicating that the plane on which the plaintiffs were passengers was going to crash could not sustain a claim for negligent infliction of emotional distress standing alone, unless accompanied by a physical manifestation. The line of demarcation between physical and mental injury seemed to be further eroded by the court's finding that the plaintiffs' allegation that they had suffered "severe shock to their nerves and nervous system" sufficiently stated a physical, rather than psychological, injury.³¹

26. *Id.*

27. *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952) (mental suffering alone, when negligently inflicted, would not sustain a claim for relief).

28. 114 Cal. App. 2d 232, 249 P.2d 843 (1952).

29. *Id.* at 234, 249 P.2d at 844. However, the ruling in *Espinosa* was that the plaintiffs' claim that their loss of sleep was a physical injury was a matter for the jury to decide guided by the instruction that a physical injury must result from the mental shock. See *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793 at 797, 56 Cal. Rptr. 115 at 117 (1967), reiterating the rule laid down in *Espinosa* that a shock through the senses to the nervous system constituted a physical injury. In *Vanoni*, however, the allegations that the plaintiffs had suffered such shock to their nervous system caused by the defendant's negligence in indicating to passengers on a flight that the plane was going to crash was sufficient to sustain the claim of physical injury. Both cases rested on *Sloane*.

30. 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967).

31. *Id.* at 797, 56 Cal. Rptr. at 117. See note 27 *supra* and accompanying text.

Further problems arose when the alleged mental distress was suffered by a third person. Even in jurisdictions which did not require a physical impact to sustain a mental distress action, such as California, recovery was denied under the theory that the defendant could not have anticipated any possible harm to the plaintiff and thus owed the plaintiff no duty. The analysis required that one be in apprehension of his or her own safety to be successful.³²

The California Supreme Court was first to recognize the viability of claims for mental distress in the case of *Dillon v. Legg*.³³ *Dillon* overruled the factually similar case of *Amaya v. Home Ice, Fuel & Supply Co.*³⁴ decided only five years before. Both involved a mother witnessing the negligent injury of her child. However, *Amaya* and earlier decisions, held that "even where a child, sister, or spouse is the object of the plaintiff's apprehension no cause of action is stated unless the complaint alleges that the plaintiff suffered emotional distress, fright, or shock as a result of fear for his own safety."³⁵ In retrospect, the *Molien* court asserted that the duty approach "begged the question whether plaintiff's interests were entitled to legal protection: the finding of a duty was simply a shorthand statement of a conclusion, rather

32. See *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). *Amaya* required that a plaintiff be in the zone of danger to recover for fear of peril to another. The court expressly rejected the idea that tort liability could be predicated upon fright or nervous shock, even where bodily illness ensued where induced solely by one's fear of negligently caused injury to a third person. *Amaya* denied recovery to a mother who witnessed her 17 month old son struck by the defendant's delivery truck. See also *Cook v. Maier*, 33 Cal. App. 2d 581, 92 P.2d 434 (1939) (california rule was that recovery for negligence did not require a physical impact, but physical injury resulting from or accompanying the negligently induced harm was still necessary to a claim).

33. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *Dillon* expressly overruled *Amaya* and the zone of danger concept referred to in note 31 *supra*. In this regard, the court suggested that:

[r]ecover for physical injury resulting from emotional trauma on witnessing the tortious infliction of death or injury on a third party does not require the claimant to have been in the zone of danger; such recovery must be governed by the general rules of tort law, including the concepts of negligence, proximate cause and foreseeability

68 Cal. 2d at 728, 441 P.2d at 913, 69 Cal. Rptr. at 73.

34. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). The *Dillon* majority sought to illustrate the fallacy of the *Amaya* rule that would deny recovery to the mother who witnessed the death of her child but not to the child's sister simply because she was a few feet closer to the accident and thus within the zone of danger. A further illustration of the inadequacy of the zone of danger rule pointed out in *Dillon* was the incongruity of rejecting the impact requirement for recovery but still requiring one be in the zone of danger by fearing impact of harm to oneself. 68 Cal. 2d at 732-33, 441 P.2d at 916-17, 69 Cal. Rptr. at 76-77.

35. *Reed v. Moore*, 156 Cal. App. 2d 43, 45, 319 P.2d 80, 82 (1957); See *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (see note 32 *supra*). *Dillon* overruled these cases.

than an aid to analysis in itself."³⁶

In *Dillon*, the court listed three factors to balance in determining whether the harm was reasonably foreseeable by the defendant: the plaintiff's proximity to the accident scene; whether the shock resulted from direct observance of the accident as opposed to learning of it second hand; and the closeness of the relationship between the plaintiff and the victim.³⁷

The court in *Molien*, however, distinguishes *Dillon* in that *Molien* inquired whether the plaintiff suffered direct emotional distress, rather than by fear of peril to a third person as in *Dillon*.³⁸ This difference was based on the fact that in *Molien* the plaintiff-husband was a direct victim of the negligent act.³⁹ The difference in the plaintiffs' positions in the two cases did not appear to be all that distinct.⁴⁰

B. Loss of Consortium

Loss of consortium was an action defined at early common law as any wrong resulting in physical incapacity to a wife which was sufficient to deprive a husband of her "services."⁴¹ The reciprocal action was not recognized. The loss of services was the primary loss at that time, but modernly, consortium has evolved to represent the noneconomic aspects of the marital relationship. These have been held to include intangibles as society, comfort, companionship, and sexual relationships.⁴²

36. 27 Cal. 3d at 921-22, 616 P.2d at 816, 167 Cal. Rptr. at 834. The duty approach was defined by whether or not one was within the zone of danger. If a person was within the zone of danger, the defendant owed a duty to him. This was the reasoning of the *Dillon* court which the *Molien* majority preferred not to follow. *Id.*

37. Consideration of these factors would determine whether the harm to the plaintiff was foreseeable and thus whether the defendant owed a duty of care that was breached by the action.

38. 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

39. *Id.*

40. Although the positions of the plaintiffs in *Molien* and the plaintiffs in *Dillon* do not appear to be very significant, the court in *Molien* felt otherwise even though both plaintiffs suffered emotional harm. In *Molien*, the court found that the negligent conduct of the defendant was directed toward the plaintiff because of the nature of the disease and the manner in which it is transmitted. The negligent diagnosis of the doctor allegedly caused the plaintiff to be a direct victim. However, in *Dillon*, the court found that it was foreseeable that a mother would be in the vicinity of her child and, thus, when the child was in danger, the mother would probably suffer serious shock. *Dillon*, 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 79.

41. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 889. (4th ed. 1971).

42. See note 13 *supra*.

The general rule in California was, until *Rodriguez v. Bethlehem Steel Corporation*,⁴³ that neither spouse could recover for this tort. However, the *Rodriguez* court revitalized the action under a particularly compelling factual situation.⁴⁴ In *Molien*, however, the court asserted that the extreme physical disablement of the husband in the *Rodriguez* case was not crucial to the decision. The critical factor was the debilitating injury to the spouse, from whatever its origin.⁴⁵

The California Supreme Court took note of a decision by the Supreme Court of Massachusetts which addressed the issue of nonphysical injury to a plaintiff's spouse in the context of intentionally inflicted emotional distress.⁴⁶ The Massachusetts court found that "the underlying purpose of such an action is to compensate for the loss of companionship, affection and sexual enjoyment of one's spouse, and it is clear that there can be loss as a result of psychological or emotional injury as well as from actual physical harm."⁴⁷ The California court found this reasoning to be persuasive and equally applicable to situations where the psychological harm is negligently inflicted.⁴⁸

III. CASE ANALYSIS

A. Emotional Distress

The California Supreme Court initially seized upon the distinction between the respective positions of the plaintiffs in *Dillon* and *Molien* in declining to apply to the guidelines established in *Dillon* to determine whether the defendant owed a duty to the plaintiff. The court held the general principle of foreseeability, which was the controlling principle in *Dillon*, to be applicable to the present case and that each case would turn on its own unique factual setting.⁴⁹ Finding at the outset that the risk of harm to the plaintiff, as well as his wife, was foreseeable, the court found that

43. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

44. See notes 10-11 *supra* and accompanying text.

45. 27 Cal. 3d at 932-33, 616 P.2d at 823, 167 Cal. Rptr. at 841.

46. *Agis v. Howard Johnson Company*, 371 Mass. 140, 355 N.E.2d 315 (1976).

47. *Id.* at 146, 355 N.E.2d at 320.

48. 27 Cal. 3d at 932, 616 P.2d at 823, 167 Cal. Rptr. at 841.

49. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834. In this aspect, the court stated that:

[T]he significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for resolution of the precise issue then before us; rather, we apply its general principle of foreseeability to the facts at hand, much as we have done in other cases presenting complex questions of tort liability.

Id.

a duty was owed to the plaintiff by the defendant. The Court proceeded to consider the issue of physical injury.

The court considered mental distress to be a specific tort and found that the *Sloane* case laid the foundation for two often stated principles. The first of these is that damages for emotional distress are to be considered parasitic to an independently recognized tort, and secondly, that mental harm can be classified as either a physiological or psychological injury.⁵⁰ The court noted that the law of negligence still required either physical harm resulting from emotional injury or physical injury incidentally producing emotional disturbance.⁵¹ Additionally, the court found that this rule has been blindly followed since its inception in *Sloane* with little regard for the varied factual contexts in which such claims arise.⁵²

In the course of its opinion, the court ultimately recognized that a claim for negligent infliction of emotional distress was an independent tort, and searched for the historical justifications behind the often stated rule requiring physical harm. It found that the *Sloane* court, and subsequent courts applying *Sloan*, had not examined the underlying reasons for the rule but had merely applied it mechanically.⁵³ Through sources other than case decisions, the court found that "[t]he primary justification for the requirement of physical injury appears to be that it serves as a screening device to minimize a presumed risk of feigned injuries and false claims."⁵⁴ Since physical harm was considered to be capable of objective proof, it served as a guarantee of the genuineness of the accompanying claim of emotional distress.

California was also found to have generally provided an individual with compensation for emotional injury when some other cir-

50. *Id.* at 924-25, 616 P.2d at 817-18, 167 Cal. Rptr. at 835-36.

51. *Id.* The court found the state of the law, to be as follows:

[t]here can be no recovery of damages for emotional distress unaccompanied by physical injury where such emotional distress arises only from negligent conduct. However, if a plaintiff has suffered a shock to the nervous system or other physical harm which was proximately caused by negligent conduct of a defendant, then such plaintiff is entitled to recover damages from such a defendant for any resulting physical harm and emotional distress.

Id. (citing BAJI No. 12.80 (6th ed. 1977)).

52. *Id.* at 924-25, 616 P.2d at 817-18, 167 Cal. Rptr. at 835-36.

53. *Id.*

54. *Id.* at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836.

cumstance provided the desired guarantee of genuineness.⁵⁵ Physical injury occurring either simultaneously or as a consequence of emotional harm was one means to assure a claim's validity. A second means was an independent claim asserted separately from the personal injury cause of action. Finally, extreme and outrageous conduct amounting to the intentional infliction of severe emotional distress served as another method for assuring a claim for compensation for emotional injury was not fraudulent.⁵⁶

The court looked to various authorities in other jurisdictions to sustain its proposition that the rule denying such recovery was arbitrary, unfounded, and not the appropriate means to attain the goal of warding off false claims. Certain scholars⁵⁷ had maintained that such artificial barriers were not essential to serve the purported goal. "Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof."⁵⁸ The problem, the court found, was essentially one of proof, and that barring all claims when some could be readily proven was an unnecessarily overbroad means to protect the integrity of the judicial process. Secondly, the distinction between mental and physical injury had proved to be a very vague distinction. Allowing recovery for emotional distress when accompanied by physical manifestation, but denying redress for emotional distress not so accompanied was found to be an arbitrary denial.⁵⁹

Also noted by the court was a decision by the Hawaii Supreme Court on the identical issue.⁶⁰ In discarding the rule that there could be no cause of action for negligently inflicted emotional distress standing alone, the Hawaii Supreme Court reasoned that "courts which have administered claims of mental distress incidental to an independent cause of action are just as competent to administer such claims when they are raised as an independent ground for damages."⁶¹ The Hawaii court found that by using serious emotional disturbance according to a reasonable person standard, defendants would not be held accountable for minor or trivial actions.⁶² The California Supreme Court agreed that the unqualified requirement of physical injury was no longer justi-

55. *Id.*

56. *Id.* at 926-27, 616 P.2d at 819, 167 Cal. Rptr. at 837.

57. The court primarily looked to the writings of Dean Prosser, Dooley, and Roscoe Pound. *Id.* at 926, 930, 616 P.2d at 818, 821, 167 Cal. Rptr. at 836, 839.

58. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328 (4th ed. 1971).

59. 27 Cal. 3d at 928-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-40.

60. *Id.* at 927-28, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38.

61. *See* note 15 *supra*.

62. 52 Hawaii at 172, 472 P.2d at 519 (1970).

fied.⁶³

The court cited two major deficiencies in the reasoning that has denied plaintiffs with claims for mental distress access to courts. The first difficulty was that the scheme was overinclusive in allowing any plaintiff access despite the triviality of his physical injury and underinclusive in automatically denying the same access to claims without physical injury that were meritorious and could easily be proved.⁶⁴ The second major problem with the rule was that it encouraged distorted pleadings in order for a plaintiff to be able to get into court. Often a counselor could exaggerate a minor injury so that a plaintiff could recover a large judgment on the element of emotional distress.⁶⁵

The court found that the attempt to distinguish between a psychological and physiological injury merely disguised the real issue, which was one of proof. The standard of proof required to support a claim of a compensable injury was found to be sufficient to weed out fictitious from genuine claims. The court found that screening claims at the pleading stage on the basis of an arbitrary classification of an injury as either mental or physical invaded the province of the jury.⁶⁶

In applying the foregoing reasoning to the facts presented, the court held that the complaint stated a cause of action, being the negligent diagnosis of the plaintiff's wife, and that the events resulting proximately therefrom were objectively verifiable. The emotional responses flowing from these actions were foreseeable and, as such, served to insure the genuineness of the claim. Finally, the fact that a false charge of having syphilis can constitute slander *per se* served to corroborate the claim of emotional distress.⁶⁷

B. *Loss of consortium*

The court found that the cause of action for loss of consortium resulting from the same negligent diagnosis was valid despite the

63. 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

64. *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838. In light of the fear of litigation, the court stated that "[i]f physical injury, however slight, provides the ticket for admission to the courthouse, it is difficult for advocates of the 'floodgates' premonition to deny that the doors are already wide open . . . 'mental suffering frequently constitutes the principal element of tort damages.'" *Id.* at 928.

65. *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

66. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

67. *Id.* at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

fact that the initial case giving viability to such claims in California involved serious physical as distinguished from emotional injury.⁶⁸ Since the distinction between physical and mental injury is no longer justified in sustaining an action for negligent infliction of emotional distress, the court held that the same is true for loss of consortium. In *Rodriguez*, several references were made to the severe physical injury of the plaintiff's husband, but the court did not restrict the holding to those particular facts.⁶⁹ As previously discussed, one may become severely disabled from mental, as well as physical causes.⁷⁰ The loss to the plaintiff spouse is the same.⁷¹

Rodriguez dealt with the issue of whether or not to recognize loss of consortium as a tort at all. There was no attempt to limit the origin of the injury which would support the claim. Serious physical injuries were not critical to the decision. The court defined consortium to include such abstract factors as conjugal society, comfort, affection, and companionship, and stated that "an important aspect of consortium is thus the moral support each spouse gives the other."⁷² Thus damage to a spouse's mental or emotional well being could deprive the other of those intangible factors included in consortium as surely as a physical injury.

Other compelling reasons were found by the court for not limiting the injury suffered by the plaintiff's spouse to physical injury. "It is irrefutable that certain psychological injuries can be no less severe and debilitating than physical injuries."⁷³ The question, as with negligent infliction of emotional distress, is one of proof, i.e., whether the injury that the plaintiff's spouse received is serious enough to interfere with the marital relationship in more than a temporary fashion. The degree of harm suffered is susceptible to proof and although proof may be more difficult when the harm is emotional than physical, and where induced negligently rather than intentionally, these are questions for the jury to resolve.⁷⁴

IV. CASE IMPACT

The major repercussions feared by the extension of liability in *Molien* are the same as those which have precluded recognition of any independent tort in emotional injury. The dissenters in *Molien* and *Dillon* marshal essentially the same reasons as those

68. *Id.* at 931, 616 P.2d at 821-22, 167 Cal. Rptr. at 839-40.

69. See notes 10-12 *supra* and accompanying text.

70. See notes 12-14 *supra* and accompanying text.

71. *Id.* at 931-33, 616 P.2d at 821-23, 167 Cal. Rptr. at 839-41.

72. 12 Cal. 3d at 405, 525 P.2d at 684, 115 Cal. Rptr. at 780.

73. 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841.

74. *Id.*

historically advanced against recognition of emotional distress. Their concern included fears of increased litigation, infinite liability, and false claims.⁷⁵ The California Supreme Court previously held in *State Rubbish Collectors Association v. Siliznoff* that "to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary to insure that serious mental suffering actually occurred"⁷⁶ when it recognized an independent cause of action for the intentional infliction of severe emotional distress.

However, the *Dillon* court dismissed the argument that such an extension of liability would result in holding persons responsible for every trivial act amounting to little more than rude manners by analogizing to the ancient products liability case of *Winterbottom v. Wright*.⁷⁷ The court asserted that history showed that this argument was a fallacy.

Denying recovery to all plaintiffs because some may have manufactured their claims was examined and rejected by the California Supreme Court in *Dillon*.⁷⁸ Administrative convenience does not justify blanket denial of relief to those asserting worthy claims. Such a rationale imputes the ability of the judiciary to perform its assigned function of providing remedies for substantial wrongs.⁷⁹ It seems that confidence in the judicial system and its ability to recognize false claims is an underlying supposition to allowing recovery for emotional distress or loss of consortium absent physical injury.⁸⁰

75. See *Molien*, 27 Cal. 3d at 933-37, 616 P.2d at 823-26, 167 Cal. Rptr. at 841-44 (Clark, J., dissenting); *Dillon*, 68 Cal. 2d at 748-52, 441 P.2d at 925-28, 69 Cal. Rptr. at 85-88 (Traynor, C.J., and Burke, J., dissenting).

76. *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal. 2d at 338, 240 P.2d at 286.

77. *Winterbottom v. Wright*, 152 Eng. Rep. 631 (Ex. 1842). In citing the ancient *Winterbottom* case, which denied recovery to a consumer for want of privity of contract, the *Dillon* majority sought to illustrate that extending the area of possible liability was sometimes necessary to keep abreast of the needs of society. The fact that liability is extended, it was asserted, should not be a reason in itself to defeat it. 68 Cal. 2d at 735-37, 743-44, 441 P.2d at 917-18, 922-23, 69 Cal. Rptr. at 77-78, 82-83.

78. 68 Cal. 2d at 735-37, 441 P.2d at 922-23, 69 Cal. Rptr. at 82-83.

79. *Id.* at 736, 441 P.2d at 918, 69 Cal. Rptr. at 77.

80. This certainly seems to be the underlying optimism in *Dillon* and *Molien* asserted by the majority. The former case dealt only with the tort of negligent infliction of emotional distress and asserted that it was extremely unlikely that "the problem of the fraudulent claim is substantially more pronounced in the case of a mother claiming physical injury resulting from seeing her child killed than in other areas of tort law in which the right to recover damages is well established in

The dissenters in *Dillon* and *Molien* contend that extending liability beyond the bounds of proximately caused injury would result in irrational and inaccurate jury verdicts.⁸¹ They questioned a jury's ability to discern viable psychological injury. In *Amaya*, the case overruled by *Dillon*, the majority relied upon a medical study emphasizing the complexity of such issues and urging that juries not be utilized to decide such cases.⁸² Further findings revealed by the study indicated that most persons claiming emotional distress had less than normal resistance to psychic stimuli. Out of the 301 cases studied, only 55 established causation by a preponderance of the evidence. The dissenters in *Molien* specifically accused the court of advancing the law ahead of modern psychology and medicine, alleging that empirical data still showed that neither psychologists nor juries are better equipped today to accurately adjudicate the authenticity of emotional disturbance claims than centuries ago.⁸³

The majority, however, determined that the law does not require mathematical exactitude in either determining issues of liability or equating physical injury with monetary awards.⁸⁴ More fundamentally, they asserted that allowing for emotional injury, and recognizing it as an actual injury, will open the courtroom doors to meritorious claims while denying automatic entrance to those that exaggerate physical symptoms and harbor ulterior motives of collecting large judgments on the emotional distress component of damages.⁸⁵ The burden of proof necessary to prosecute a claim of negligent infliction of emotional distress or loss of con-

California." *Dillon*, 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78. In *Molien*, which dealt with both torts, the court expressly stated it had confidence that the system would accurately separate sham from serious suits. "[O]ur faith in the ability of the jury to exercise sound judgment in fixing compensation [for mental suffering was acknowledged in *Rodriguez* and we] reaffirm that faith today." *Molien*, 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841.

81. See 27 Cal. 3d at 935-36, 616 P.2d at 824, 167 Cal. Rptr. at 842. The dissenting opinion examined the court's findings in *Amaya* and rightfully determined that adjudicating the effects of mental disturbance would be very difficult for jurors. See note 75 *supra* and accompanying text.

82. The study relied on by the majority in the *Amaya* case was Smith, *Relations of Emotions to Injury and Disease, Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

83. 27 Cal. 3d at 935-36, 616 P.2d at 824, 167 Cal. Rptr. at 842.

84. 68 Cal. 2d at 738, 441 P.2d at 919, 69 Cal. Rptr. at 79. After examining the history of the law on the tort of both negligently and intentionally inflicted emotional distress, and the rationales that have supported a denial of recovery, the court noted that "[i]n terms of characterizing conduct as tortious and matching a money award to the injury suffered as well as in fixing the extent of injury, the process cannot be perfect." *Id.*

85. 27 Cal. 3d at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. This follows from one of the major problems that the majority saw in the rule that it abolished; that is, the encouragement of extravagant pleadings alleging physical injury such that the plaintiff could get into court.

sortium absent physical injury to a plaintiff's spouse will suffice as a guarantee of genuineness. While opponents of the newly announced rule contend that *Molien* dispenses with any meaningful standards to which the evidence in the case may be directed, the court believes that establishing foreseeability of harm to the plaintiff will suffice as a meaningful standard.⁸⁶

Some limitations on recovery may be advisable, even though subsequent cases may prove them to be arbitrary. The circumstances of each case will have to be evaluated to ascertain whether any facts corroborate the claim of emotional distress and thus guarantee the genuineness of the injury. *Molien*, it must be remembered, is directed only to the situation where the person asserting emotional harm is a direct victim or directly affected by the defendant's negligent act.⁸⁷ The standard is not the particular defendant's range of foreseeability nor the particular plaintiff's threshold of emotional strain, but is, instead, that of an ordinary person of reasonably sound mind. Such a standard is useful in safeguarding the integrity of the judicial system from the historical fear of the feigned claim.⁸⁸

While the court has not addressed a right of independent recovery where the emotional distress is caused by fear of harm to a third person, the same reasoning appears to be equally applicable. If the harm is sufficiently severe to induce serious emotional

86. *Id.* at 934-35, 616 P.2d at 824, 167 Cal. Rptr. at 842. The dissenting opinion states that the safeguard of the old rule in requiring accompanying physical injury in a claim for negligently inflicted emotional distress is abandoned for a new standard of "some guarantee of genuineness in the circumstances of the case" and where "proof of mental distress is of a medically significant nature." The dissent finds these newly enunciated standards to be "nonstandards, opening wide the door to abuse." *Id.* at 935, 616 P.2d at 824, 167 Cal. Rptr. at 842 (Clark, J., dissenting).

87. *Id.* at 922-24, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35. The emphasis of the majority is on a case-by-case approach. The court stated that "under these circumstances" the defendants owed a duty of care to the plaintiffs. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

88. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. In agreeing with the Supreme Court of Hawaii, which held a cause of action for negligent infliction of emotional distress was an independent tort, the *Molien* majority found that the "general standard of proof required to support a claim of mental distress in some guarantee of genuineness in the circumstances of the case." *Id.* The Hawaii court further held that a reasonable person standard should be utilized. *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38. The court in *Molien* seemed to be saying that since juries have always operated under the "reasonably prudent person" standard, they should have no problems in deciding these cases. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

distress in a reasonable person of ordinary sensibilities, recovery should be permitted. While *Molien* classified the plaintiff as a direct victim of the negligent act because the defendant could foresee the harm that could be caused him, the husband's position does not appear to be significantly different from that of the mother in *Dillon* who witnessed the death of her child.⁸⁹ The recognition of the mother's right to recovery in *Dillon* was based upon the fact that she was directly affected by the defendant's negligent act.

Another limitation that should be placed on recovery concerns the relationship between the plaintiff and the victim. *Dillon* stated that this was to be one factor in considering whether the plaintiff's emotional injury was foreseeable.⁹⁰ For example, the California Supreme Court has, subsequent to the *Rodriguez* case, placed a limit on recovery that excluded a cause of action by a child for loss of parental consortium. In *Borer v. American Airlines, Inc.*,⁹¹ the court held a child had no cause of action for loss of parental consortium.

V. CONCLUSION

By recognizing the severity and credibility of psychological injury on a similar level as physical harm, the California Supreme Court in *Molien* allows one to seek compensation for negligent infliction of emotional distress without prior requirements of physical injury to act as guarantee of genuineness. In categorizing the problem as one of proof to be resolved by a jury, the court seeks to allow deserving claims to proceed to trial while still assuring the validity of complaints by allowing corroborating evidence to serve as a measure of validity. By identifying the reasons for the previous ban, and the inadequacy of the prior rule to serve its purported purpose, the court has simultaneously created the pos-

89. See note 40 *supra*.

90. *Dillon*, 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.

91. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977). It is interesting to note that the reasons given for not allowing a child to recover for loss of parental consortium are the same reasons that have been historically advanced for not recognizing any form of emotional distress. The court suggests that:

[p]olicy considerations militating against the creation of such a cause of action, unsupported by statute or precedent, include the difficulty of assessing and the basic inaptness of, monetary compensation for such an intangible injury to the child; the increase, if such a cause of action were created, in the number of claims asserted against, and in the ultimate liability of, defendants in ordinary accident cases; and the administrative burden of settling or resolving such claims.

Id. at 442, 563 P.2d at 859, 138 Cal. Rptr. at 303.

sibility of ill effects in the form of increased litigation while reducing the necessity of exaggerated pleadings to get into court.

As for loss of consortium, the court has taken a considerable step in extending liability when one considers that the common law tort was revitalized only a few years ago. However, the nature of the loss inherent in the tort makes it consistent to recognize a plaintiff's claim where his or her spouse has suffered serious, permanent, and disabling injury, whatever its source. Since the loss is basically an emotional one, recognition of loss incurred as a result of mental or physical harm, appears to be a logical extension.

B. DEFENSES

1. *Governmental Immunity And The Duty To Warn:* *Thompson v. County of Alameda*

The California Supreme Court extends government immunity by restricting the existence of a duty to warn of a probationer's violent tendencies to exacting circumstances. The simplistic and inequitable nature of the decision, in addition to its departure from recent trends is discussed.

I. INTRODUCTION

The California Supreme Court, in *Thompson v. County of Alameda*,¹ held that the state has no affirmative duty to warn large amorphous groups of people of a probationer's dangerous propensities. A specific duty to warn does not arise until it is demonstrated that the state had knowledge of the offender's malevolent intentions toward a known identifiable victim.² Only with this knowledge will a special relationship³ exist between the potential victim and the state such that the state has an affirmative duty to warn the victim of his imperiled situation. By requiring that a special relationship be demonstrated, the *Thompson* decision has effectively expanded governmental immunity in police and correc-

1. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

The majority opinion was written by Justice Richardson with Chief Justice Bird and Justices Clark, Newman, and Caldecott concurring. Justice Tobriner wrote a dissenting opinion in which Justice Mosk concurred. Justice Caldecott was temporarily assigned by the chairperson of the judicial council.

2. *Id.* at 750-51, 614 P.2d at 735, 167 Cal. Rptr. at 77.

3. See notes 18, 20, and 22 *infra* and accompanying text.

tional activities.⁴

Plaintiffs resided a few doors from James, a known 18 year old juvenile offender. Prior to his release, James had been under the control of the defendant County of Alameda. During his confinement the County became aware that James had manifested "latent, extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence connected therewith were a likely result of releasing [him] into the community."⁵ In addition, the County had knowledge that James "indicated that he would, if released, take the life of a young child residing in the neighborhood."⁶ However, he never indicated any specific child as his potential victim.

Despite these known tendencies, James was released on temporary probation into the custody of his mother. Prior to his release the County did not warn James's mother, the local police, or nearby neighbors of James's intentions or his known violent tendencies. Soon after his release, James murdered the plaintiffs' son in the garage of James's mother's home.

Plaintiffs filed suit claiming the wrongful death of their child due to the County's "reckless, wanton and grossly negligent actions"⁷ in releasing James without sufficient warning. The County demurred contending that the plaintiffs had failed to state a cause of action, since their actions were shrouded with immunity under the California Government Code.⁸ The defendant's demurrer was sustained and the plaintiffs appealed to the California Supreme Court which upheld the trial court's decision.⁹

4. See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), and *Johnson v. State of Cal.*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). See also notes 10, 18, and 21 *infra* and accompanying text.

5. 27 Cal. 3d at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.

6. *Id.*

7. Plaintiffs alleged four separate causes of action. First, the county had acted negligently in deciding to release James into the community. Second, the county was negligent in failing to warn James's mother, the local police, and parents within the neighborhood of James's release. Third, the county was negligent in failing to exercise due care and control over James's conduct through James's mother as the county's agent. Fourth, the county failed to use due care in choosing James's mother as their agent to maintain control and custody over James. The court believed counts one, three, and four to be covered by government immunity due to their discretionary nature. Count two most concerned the court and was given the greatest attention in the decision. 27 Cal. 3d at 746-47, 614 P.2d at 730, 167 Cal. Rptr. at 72.

8. CAL. GOV'T CODE §§ 818.2, 820.2, 844.6(a)(1), 845, 845.8(a), and 846 (West 1980). Although the defendant based its demurrer on all cited code sections, the court found only sections 820.2 and 845.8 to be applicable. See note 11 *infra* and accompanying text.

9. The California Supreme Court opinion vacated a California Court of Appeal decision which had overturned the trial court's decision.

II. HISTORICAL ANALYSIS

Although the *Thompson* decision does not turn solely on the nuances of government immunity, it is important to note important distinctions. In *Johnson v. State of California*,¹⁰ the supreme court determined that the decision to release a prisoner was discretionary and, therefore, cloaked with statutory immunity.¹¹ The court in *Johnson* explained "the decision to parole thus comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination."¹² Although the choice of custodians and the decision regarding the readiness of a prisoner for release are discretionary decisions, the court in *Johnson* refused to mechanically apply the term "discretionary."¹³ Rather, the court preferred to evaluate the policy considerations behind grants of immunity in order to determine which acts are protected.¹⁴ The court found that the complexity of choosing a guardian, decisions relating to well-being, and the balancing of public interests are delicate matters of discretion requiring immunity.¹⁵

10. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

11. CAL. GOV'T CODE § 820.2 (West 1980) provides: "a public employer is not liable for an injury resulting from the acts or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

12. 69 Cal. 2d at 795, 447 P.2d at 361, 73 Cal. Rptr. at 249 (footnote omitted).

13. The court in *Johnson* considered the immunity associated with a discretionary decision as distinguished from the liability connected to ministerial decisions as explained in *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). In *Muskopf*, plaintiff sued defendant hospital for their negligence in causing her to fall and further injure her hip for which she was being treated. The defendant demurred on the ground it was a state agency performing a governmental function and as such was immune from tort liability. Seeing no reason to over-extend government immunity, the court drew a distinction indicating that government officials are liable for the negligent performance of their ministerial duties, but are not liable for their discretionary acts within the scope of their authority. See *Taylor v. Mitzel*, 82 Cal. App. 3d 665, 147 Cal. Rptr. 323 (1978) (public official is immune from tort liability for discretionary acts as long as he is acting within his capacity of a public official); *McCarthy v. Frost*, 33 Cal. App. 3d 872, 109 Cal. Rptr. 470 (1973) (decision of peace officer whether to investigate accident involves the exercise of discretion and is therefore immune from liability).

14. The *Thompson* court likewise felt the judiciary should examine if liability should attach by determining if the proper policies would be served by the extension of liability. 27 Cal. 3d at 749-50, 614 P.2d at 732, 167 Cal. Rptr. at 74. Cf. *McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (1969) (government immunity should not be extended to cover the negligent implementation of a discretionary decision since no causal relation exists).

15. See *Whitcombe v. County of Yolo*, 73 Cal. App. 3d 698, 141 Cal. Rptr. 189 (1977) (rejected the special relationship giving rise to a duty of the government to

Johnson noted the demarcation between discretionary acts, which are shielded with immunity, and ministerial acts which are vulnerable to court review. "Once the proper authorities have made the basic policy decision—to place a youth with foster parents, for example—the role of . . . immunity ends; subsequent negligent actions, such as the failure to give reasonable warnings to foster parents actually selected, are subject to legal redress."¹⁶ If a duty and subsequent breach can be demonstrated, liability can be established.¹⁷

Johnson demonstrated the presence of "a duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril."¹⁸ In *Johnson*, the state placed a minor with homicidal tendencies in Mrs. Johnson's home. Mrs. Johnson sued the state following an attack on her by the minor. The court held the state and the plaintiff were in a *special relationship* such that the state by its conduct had placed the plaintiff in clearly foreseeable danger. The court noted that the state had clear knowledge of the specific identity of the endangered persons such that the special relationship existed giving rise to the duty to warn.¹⁹ As in *Johnson*, the authorities in *Thompson* were well aware of James's threats. However, due to the imprecise nature of his threats, no special relationship was found to exist.²⁰

In *Tarasoff v. Regents of the University of California*,²¹ the court relied on an exception to the general rule that one owes no duty to control the conduct of another. Under this exception, a duty to warn arose only in exceptional circumstances.²² The exception is

control the defendant, where a probationer injured the plaintiffs due to county's alleged negligence); *County of Santa Barbara v. Superior Court*, 15 Cal. App. 3d 751, 93 Cal. Rptr. 406 (1971) (failure to warn the general public of an offender's violent tendencies is covered by the immunity associated with the discretionary decision to release).

16. 69 Cal. 2d at 799, 447 P.2d at 364, 73 Cal. Rptr. at 252.

17. Duty would attach to the ministerial enactment of the discretionary decision to release. See *McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (1969) (negligence in implementing police officer's decisions to investigate is not cloaked with immunity).

18. 69 Cal. 2d at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243 (footnote omitted).

19. Specific knowledge of the potential victim's identity is what creates the "special relationship" that is necessary for a duty to exist. The *Thompson* court asserts the specifically identifiable victim must be present before a duty to warn will arise. The court based this decision on *Johnson*. Although the *Johnson* decision did not hold that the victim must be identified and present, the court assumed such a requirement because the factual setting in *Johnson* had concerned such a particularized situation. 27 Cal. 3d at 760, 614 P.2d at 739, 167 Cal. Rptr. at 81.

20. 27 Cal. 3d at 751, 614 P.2d at 733, 167 Cal. Rptr. at 75.

21. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

22. See RESTATEMENT (SECOND) OF TORTS § 315 (1963-64). Section 315 provided

manifested in the special relationship that exists when an offender informs his custodians of his intention to do violence. *Tarasoff* determined that attending therapists had an affirmative duty to warn a known, foreseeable, and specifically identifiable victim of a patient's proposed violence. Relating the decision to the facts of *Thompson*, the court indicated a specific duty to warn only clearly identifiable persons would be imposed upon the state.²³ Also, the court restricted the *Tarasoff* decision to physicians,²⁴ while the suit in *Thompson* is against the County of Alameda.

Thompson allowed the court to examine the degree of specificity required in a suspect's threat before a duty arises by means of a special relationship. The court's decision would, in essence, expand or contract governmental immunity depending upon the amount of specificity required as determined from each set of facts. The majority preferred the more restrictive view and held the only obligation owed is a highly specific one.²⁵

that such a duty will exist in two situations: "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Johnson embodied the second situation where the state had entered into a special relationship with the plaintiff by knowingly endangering her with the probationer's presence. *Tarasoff* considered the first situation where psychotherapists had entered into a special relationship with the actor by undertaking to treat him. The *Thompson* court considers the second situation, but did not find sufficient specificity in the potential victim's identity to give rise to a special relationship. See notes 37, 39, and 41 *infra*. See also *Buford v. State of California*, 104 Cal. App. 3d 811, 819, 164 Cal. Rptr. 264, 269 (1980) (state may be in special relationship with the probationer which will give rise to a duty to control his conduct); *McDowell v. County of Alameda*, 88 Cal. App. 3d 321, 151 Cal. Rptr. 779 (1979) (county hospital has a duty to insure mental patient's safe arrival at private hospital in order to protect the public in the event of his escape); *Harland v. State of California*, 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977) (special relationship may exist in situations involving an individual's dependence on a governmental agency for rehabilitation); *Mann v. State of California*, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977) (policy behind recognizing a duty to aid is based upon the existence of relationships of dependence).

23. The *Thompson* court approved the duty to control the conduct of a mental patient found in *Tarasoff*. 27 Cal. 3d at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76. By doing so, the court appeared to indicate a more stringent rule is placed on therapists and doctors than on government agencies. This distinction is based on the importance of continuing an unhindered probation system. See note 28 *infra*.

24. See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d at 436, 551 P.2d at 345, 131 Cal. Rptr. at 25.

25. 27 Cal. 3d at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77.

III. RATIONALE OF THE THOMPSON DECISION

The court asserted that the existence of a duty is not a fact discoverable in nature.²⁶ Instead the imposition of a legal duty is a question of law and will be imposed only where a party should be liable for harm proximately caused by their negligence.²⁷ Therefore, the court based its decision on whether public policy would be promoted by requiring the government to warn the citizenry of an offender's dangerous nature.

In examining the purposes behind the probation system, the court found that parole and probation release play an integral part in the correctional system.²⁸ Quoting a variety of statistics,²⁹ it was implied that due to the vast number of individuals incarcerated, any undue restriction on the probation scheme would overload the penal system and its rehabilitative efforts. The court believed the imposition of a general duty, as requested by the plaintiffs, would result in fewer offenders being released on probation due to the government's fear of liability. Since this was statistically unacceptable,³⁰ and may also tend to thwart the state's legitimate rehabilitative effort, the court felt it better that the public bear the risk of harm.³¹ Relying on *Johnson*, the majority noted that "each member of the general public who chances to come into contact with a parolee bear[s] the risk that the rehabilitative effort will fail."³² The risk that repeat offenses may occur was seen by the court as inherent in the parole system and one not properly curbed by an extension of government liability.³³

In spite of the ever present dangers of the present system, the court chose to acquiesce to the legislature.³⁴ As a matter of pol-

26. *Id.* at 750, 614 P.2d at 732, 167 Cal. Rptr. at 74. "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability *should* be imposed for damage done." (emphasis added).

27. The court in *Thompson* spends some time in discussing the role of duty in tort law. 27 Cal. 3d at 749-50, 614 P.2d at 732, 167 Cal. Rptr. at 74.

28. *Id.* at 753-55, 614 P.2d at 732-33, 167 Cal. Rptr. at 74-75.

29. See CALIFORNIA PROBATION PAROLE AND CORRECTION ASSOCIATION, *THE FUTURE OF PROBATION* (1979); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932, 942-43 (1975); Livermore, Malurquist and Meehl, *On the Justifications for Civil Commitment*, 174 U. PA. L. REV. 75, 84 (1968).

30. See note 29 *supra*.

31. 27 Cal. 3d at 755, 614 P.2d at 736, 167 Cal. Rptr. at 78.

32. *Id.* at 753, 614 P.2d at 735, 167 Cal. Rptr. at 77 (citations omitted). The court also noted the United States Supreme Court reached a similar conclusion in *Martinez v. California*, 444 U.S. 277 (1980). In *Martinez*, the Court rejected a contention that the California immunity statutes, CAL. GOV'T CODE §§ 800 *et seq.* (West 1980), deprived plaintiff-decedent of her right to life without due process of law because a parole decision had led indirectly to her death. 444 U.S. at 280-81. The Supreme Court noted that the risk that repeated offenses may occur is present in any parole system.

33. 27 Cal. 3d at 756, 614 P.2d at 737, 167 Cal. Rptr. at 79.

34. *Id.* at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77. The court appeared to be

icy, the court believed the parole and probation system was of too delicate a nature to restrict with the imposition of a duty to warn.

The court concluded that the discretionary decision to parole would be hindered by the imposition of a duty to warn. The dissent³⁵ claimed that the discretionary decision to parole would remain cloaked with immunity under section 820.2 of the California Government Code. It is the negligent implementation of the discretionary decision that would subject the government body to liability. Therefore, the reason the government officers should fear liability for making such discretionary decisions was not clear to the dissent.

The California Supreme Court is also concerned with balancing the respective interests of the public with the purposes of the probation and parole system. To further examine if a duty should be imposed, the court weighed the possible benefit it would have relative to any corresponding detriment.³⁶

The court was concerned with the practical difficulties in meeting such a demanding obligation. A warning to police would not

saying the legislature has established the policy of placing the risk on the public and any change in the law should come from them. As noted by the dissent, the legislature had impliedly approved the trend that extended liability by refusing to enact new, more stringent, legislation as a response to *Johnson* and *Tarasoff*. 27 Cal. 3d at 762-63, 614 P.2d at 740-41, 167 Cal. Rptr. at 82-83; (Tobriner, J., dissenting); see note 67 *infra*. See generally *Beauchene v. Synanon Foundation, Inc.*, 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979) (immunity extended to private hospital to bar plaintiff's suit for injury by escapee); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (doctrine of governmental immunity may be modified by California Supreme Court as modification is not within exclusive province of the legislature).

35. Justice Tobriner notes the confusion between the discretionary decision and the subsequent implementation. 27 Cal. 3d at 764, 614 P.2d at 741, 167 Cal. Rptr. at 83 (Tobriner, J., dissenting).

36. *Id.* at 755, 614 P.2d at 735-36, 167 Cal. Rptr. at 77-78. The court believed an increase in liability by an imposition of a more general duty could not be justified as a good policy unless it could be shown as actual increase in protection would be provided. In assessing any benefit, the *Thompson* court considered many factors that must be balanced including:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral balance attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

only create an even greater sea of paperwork³⁷ and increased workload, but also would likely be ineffective unless a corresponding duty was placed upon the police to act upon such warnings. As noted in the *Tarasoff* decision, no such duty to act exists.³⁸

A mandatory duty to warn parents of neighborhood children was thought to have similar prohibitive consequences. In addition to the vast and complicated effort required,³⁹ a policy favoring release programs⁴⁰ may be thwarted. Rehabilitative efforts would likely be jeopardized by stigmatizing the released offender⁴¹ and possibly encourage the commission of an unlawful act out as a result of his own frustrations.

Most notably, the court felt any duty to warn James's mother would also be ineffective. It was believed such a duty would not achieve the desired effect of warning potential victims.⁴² Any warning by the mother to other potential victims may also stigmatize the juvenile offender negating the rehabilitative effort.⁴³

The issue here is what the court calls the "desired effect." Arguably, the desired effect is not primarily to warn others of an offenders dangerous propensities, but it is to prevent foreseeable

37. The majority believed that to increase protection in this manner would necessitate an inordinate and unrealistic expenditure of time and manpower such that the other areas of police duty would be comprised. 27 Cal. 3d at 756, 614 P.2d at 743, 167 Cal. Rptr. at 85. Also, if the legislature desired such a scheme, it would have imposed mandatory registration as it has done with certain sex offenders. See CAL. PENAL CODE § 290 (West 1980).

38. 17 Cal. 3d at 444, 551 P.2d at 349, 131 Cal. Rptr. at 29.

39. The number of government employees engaged in probation is limited. In 1978, California probation departments employed 18,331 persons in order to supervise 315,000 parolees. Any increase in a duty to warn would misuse these resources. See Keldgor and Norris, *New Directions for Correction*, 36 FED. PROBATION 3 (1972).

40. See, e.g., *Beauchene v. Synanon Foundation, Inc.*, 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979) (immunity extended to private organization to encourage rehabilitative effort); *Whitcombe v. County of Yolo*, 73 Cal. App. 3d 698, 141 Cal. Rptr. 189 (1977) (special relationship doctrine infringes too greatly upon prisoner release and rehabilitation programs).

41. 27 Cal. 3d at 757, 614 P.2d at 737, 167 Cal. Rptr. at 79. The majority also feared probation administration would be less likely to release offenders fearing potential liability and the substantial drain on their resources that warning potential victims would require. *Id.*

42. *Id.* The court surmises that the warning is the desired result. Arguably, the desired result would seem to be protecting injured victims without jeopardizing the probation program. The court must agree that at least the desired result would be to achieve the greatest utility. This is what it implies when it speaks of balancing the benefits against the difficulties of application. See note 36 *supra*. The contrary view would point out that to consider only the likelihood of a warning reaching endangered neighbors without considering the overall benefits a warning to James's mother may have, fails to examine the scenario with sufficient scope.

43. 27 Cal. 3d at 757, 614 P.2d at 737, 167 Cal. Rptr. at 79.

victims from being harmed at the hands of the paroled offender.⁴⁴ A probationer's custodian may take other measures to ensure the safety of others besides an express warning.⁴⁵ The majority believed that to expect such controlling measures from James's mother was unrealistic and could not support the imposition of civil liability.⁴⁶ To release a known dangerous offender to an unsuspecting custodian seems equally unrealistic.

The court's analysis is basically twofold. First, it would be unwise to impose a general duty upon the state since it would thwart important policy goals favoring probationary release. Second, it is simply impractical and ineffectual to create a mandatory duty to warn where the specific identity of the potential victim is not known.⁴⁷ The court felt little benefit would flow from generalized warnings such that their mandate would justify their burden.⁴⁸ The *Thompson* decision will only impose a duty where a "special relationship" can be demonstrated between the state and the endangered individual.⁴⁹ This special relationship will only exist where an offender is released with the state's knowledge that he intends harm to a certain individual, since the specific individual would be placed in danger by the offender's release.⁵⁰ No such duty will be imposed when the offender is released harbor-

44. See note 42 *supra*.

45. As Justice Tobriner notes in his dissent, the majority fails to realize that James's mother, when properly apprised of his dangerous propensities, may take special care to watch him, to know his whereabouts, insure he is not alone with young children, or otherwise control his activities. 27 Cal. 3d at 764, 614 P.2d at 741, 167 Cal. Rptr. at 83. (Tobriner, J., dissenting). In fact if James's mother had been aware of his intentions, she may not have agreed to assume custody at all, fearing for the neighborhood's, her own, or even James's well-being.

46. *Id.* at 757-58, 614 P.2d at 737-38, 167 Cal. Rptr. at 79-80.

47. The court believed such a duty to warn would stretch the concept of foreseeability to create a duty owed to a "member of a large amorphous public group of potential targets." *Id.* at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80. Of course, this view begs the question of how a "young child in the neighborhood" is a member of such an amorphous group.

48. *Id.* at 755, 614 P.2d at 736, 167 Cal. Rptr. at 78.

49. By approving the *Tarasoff* decision the court appeared to limit any special relationship between the state and the offender to apply only to physicians. See RESTATEMENT (SECOND) OF TORTS § 315(a) (1963-69). The state must bear a special relationship to the victim before a duty will arise; thus, the victim's identity must be readily identifiable. See note 62 *infra*.

50. Since the state would know the offender's intentions and the identity of the potential victim, a duty to warn the victim would arise since he specifically has been placed in peril by the offender's release. See *Johnson v. State of Cal.*, 69 Cal. 2d at 785-86, 447 P.2d at 355, 73 Cal. Rptr. at 243 (a duty to warn is placed upon those who create a foreseeable peril).

ing a known general desire to commit an offense against no particular individual.⁵¹ No liability will arise for any subsequent harm the offender inflicts, although the victim may be a member of a foreseeable but ill-defined group.⁵²

Since James failed to designate precisely which young child he intended to murder, no duty was placed upon the County to warn the police, potential victims, or James's mother of his release.

IV. CASE IMPACT

The *Thompson* decision narrows the holdings of *Johnson* and *Tarasoff*. The majority presumes that since both *Tarasoff* and *Johnson* concerned a failure to warn identifiable victims, the reasoning of those decisions is limited to only that situation despite the indications, especially in *Tarasoff*, that there should be wider application.⁵³ For example, where the *Thompson* court desired hard lines between the existence or non-existence of a duty, *Tarasoff* sought to impose an obligation that would vary as the situation demanded. For example, where the victim is specifically identifiable, a warning directly to him will discharge the state's obligation. If the potential victim is not specifically identifiable, but is a member of an identifiable class, the state's obligation should require some warning to the class. If the probationer is released with known hostile tendencies, but without an intended victim, his guardian should be warned to be watchful for malevolent actions. Under *Tarasoff*, the nature of the case would dictate the nature of the duty to be imposed.⁵⁴

51. 27 Cal. 3d at 750-51, 614 P.2d at 735, 167 Cal. Rptr. at 77.

52. *Id.*

53. The decision in *Tarasoff* indicates that the nature of the state's obligation should vary with the surrounding circumstances. Even the existence of an identifiable victim was not essential to the cause of action. What *Tarasoff* indicated was a duty of care owed to all persons foreseeably endangered by the offenders release. Depending on how foreseeable a victim may be will vary the duty owed accordingly. Therefore, the degree of care owed depends on the circumstances. "Thus, [the duty imposed] may call for [the doctor] to warn the intended victim or another likely to apprise the victim of the danger, to notify the police, or to *take whatever other steps are reasonably necessary under the circumstances.*" 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20 (emphasis added).

54. See Comment, *supra* note 29, at 937-38. The author notes that "[r]ather than attempt to set up a rule with universal application, courts have focused on special relationships between people as a basis for changing the traditional duties owed between individuals. A moral dilemma is noted in *Tarasoff*, similar to the law concerning the duty to rescue." See also W. PROSSER, LAW OF TORTS 340-41 (4th ed. 1971). Examples of decisions which have attempted to turn moral duties into legal ones are: *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947) (duty to rescue imposed upon social hosts); *Dove v. Lowden*, 47 F. Supp. 546 (W.D. Mo. 1942) (duty to rescue imposed upon innkeepers); *Yee v. New York, New Haven, and Hartford R.R. Co.*, 145 Conn. 451, 144 A.2d 56 (1958) (duty to rescue imposed upon carriers); *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942) (duty to rescue

Rather than allow the obligation placed upon the state to vary with the specificity of an offender's threat or the foreseeability of potential harm,⁵⁵ the *Thompson* decision enacts a rigid test that demands essential certainty as to the victim's identity. The court implied any duty would require a maximum effort;⁵⁶ therefore, a duty would be imposed only in the most dangerous and demanding circumstances.⁵⁷ Apparently overly concerned with the practicalities of an adequate warning,⁵⁸ the court opted for the clear but easy line of demarcation between the existence or non-existence of a duty to warn.⁵⁹

Although admitting that a potential victim need not be precisely identifiable, it still remains unclear how readily identifiable a victim must be before a duty will arise.⁶⁰ This concern can be seen in the nature of the facts in *Thompson*. James had identified his

imposed upon shopkeepers); and *Farmer v. State*, 224 Miss. 96, 79 So. 2d 528 (1955) (duty to rescue imposed upon jailers).

55. See notes 53-54 *supra* and accompanying text.

56. This can be inferred by the court's discussion of how difficult and time consuming it would be to insure potential victims are warned. 27 Cal. 3d at 750-58, 614 P.2d at 732-38, 167 Cal. Rptr. at 74-80.

57. The duty to warn will arise only where a specific or readily identifiable victim is concerned. *Id.* at 753, 614 P.2d at 735, 167 Cal. Rptr. at 77.

58. The court asserts that the difficulties in application will override any benefits that may result from warnings in other circumstances. This fails to consider the real effect some method of warning might have had. See note 45 *supra*.

59. The majority preferred rigidity and ease of application to the flexibility proposed by *Tarasoff*. See note 53 *supra*. It can only be surmised that the court chose their avenue, not only to limit the liability of the state, but also to allow a high degree of predictability to attach when the state releases an offender. Although simplifying the issue, the *Thompson* holding does not create a duty corresponding to the amount of peril created by the offender's release as *Tarasoff* would have indicated. See *Buford v. State*, 104 Cal. App. 3d 811, 164 Cal. Rptr. 264 (1980) (a duty to warn will arise where a special relationship exists, with such relationship being a function of foreseeability); *Whitcombe v. County of Yolo*, 73 Cal. App. 3d 698, 141 Cal. Rptr. 189 (1977) (duty is a matter of relationship founded on foreseeability).

60. *Tarasoff* had indicated a victim need only be readily identifiable for a duty to attach. The *Tarasoff* court explained "readily identifiable" to mean that although it may not be completely clear whom the offender intends as his victim, a "moments reflection" will [generally] reveal the victim's identity. 17 Cal. 3d at 439 & n.11, 551 P.2d at 345 & n.11, 131 Cal. Rptr. at 25 & n.11. If only a "moments reflection" will be necessary in order to determine the identity of the undisclosed victim, the potential assailant's description must be highly particular. This would seem to indicate that if James had named twenty neighborhood children by name, claiming he would kill one of them, the threat would still be too general and no duty would arise. See *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 600-01, 162 Cal. Rptr. 724, 729-30 (1980), which urged the holding in *Tarasoff* be construed narrowly, lest liability come between the psychotherapist and his proper function.

victim as a "young child residing in the neighborhood."⁶¹ In this manner James had identified both his victim's physical characteristics and location. A "moments reflection" clearly reveals a specific group endangered by the state's conduct. Although the state may have been unwise to warn every young child in the neighborhood, some obligation to control James's behavior should have been imposed. If the facts in *Thompson* will not give rise to such an obligation, the court's holding likely requires certain identification of a particular individual.⁶²

The *Thompson* decision expands government immunity in contradiction of the clear trend of California decisions.⁶³ By imposing such a highly specific duty, it is the rare case in which the duty will be imposed. It is likely the government will only infrequently be found to have breached their obligation.⁶⁴ The majority claims such a specific duty is required by the legislative intent in protecting the important function of the probation program by cloaking its administration with immunity.⁶⁵

The court could have considered section 820.2 of the California Government Code as sufficiently protecting the important parole decisions and their discretionary nature. With this in mind, it would be unnecessary to further shield the government from liability when it engages in the negligent implementation of those decisions.

As noted by Justice Tobriner,⁶⁶ twelve years have passed since

61. 27 Cal. 3d at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.

62. The *Thompson* decision indicates that a particularized signification of an identifiable group may not even be enough to invoke a duty to warn; a specific individual is necessary before an obligation will arise. Although a designated group may be insufficiently particular to give rise to a duty to warn each member of the group, knowledge of an offender's violent intentions arguably should create some duty owed toward them to insure their safety. A discharge of this duty would at least require a warning to an offender's custodian. See RESTATEMENT (SECOND) OF TORTS § 315(a) (1963-64); Merchants National Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D.N.D. 1967) (Veterans Administration failed to meet their duty of care by releasing a patient to work on a local farm without warning farmer of patient's intentions to kill patient's wife resulting in the wife's murder); McDowell v. County of Alameda, 88 Cal. App. 3d 321, 151 Cal. Rptr. 779 (1979) (county hospital owed a duty to insure patient's safe arrival at treating private hospital in order to protect the public in the event of his escape).

63. See *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P.2d 699, 115 Cal. Rptr. 765 (1974); *Baldwin v. State*, 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972); *Ramos v. County of Madera*, 4 Cal. 3d 685, 692, 484 P.2d 93, 98, 94 Cal. Rptr. 421, 426 (1971); *Muskopf v. Corning Hosp. Dist.* 55 Cal. 2d 211, 219, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961).

64. It is possible that the probation department will not release an offender when he has manifested his violent intention so specifically or it may be difficult to prove the state had particular knowledge of the offender's intended victim.

65. See note 34 *supra* and accompanying text.

66. 27 Cal. 3d at 762, 614 P.2d at 740, 167 Cal. Rptr. at 82 (Tobriner, J., dissenting).

the *Johnson* decision. In that period the legislature has not amended the Government Code to increase government immunity beyond that described in *Johnson*,⁶⁷ nor has any exclamation been heard to the effect that *Johnson* or *Tarasoff* endanger the state's parole or probation programs. It is odd that the court feels that it is necessary to defer to the legislature when the legislature has implicitly consented to the trend in *Tarasoff*.

The court also believes that the duty created by a special relationship may only exist when the special relationship exists directly between the state and the potential victim.⁶⁸ In contrast, by implication, the majority did not agree that a special relationship may exist between the state and the offender such that the state would have a duty to control his conduct. Had this been the holding, a warning to at least James's mother would have been appropriate. It is likely the court found it inconsistent to find a duty to control the offender's conduct existed and then hold the duty to be discharged by nothing more than a mere warning to the offender's custodian. Not wishing to impose a great burden of absolute control upon the state, it was simpler to recognize a duty that would extend only to a readily identifiable victim and then require an express warning to that victim.

V. CONCLUSION

The *Thompson* decision reflects the California Supreme Court's desire to clearly delineate the line between the imposition of a duty and governmental immunity. Rejecting the flexibilities found in *Tarasoff*,⁶⁹ the court held only when an offender becomes sufficiently specific in his threats will a specific duty to warn arise.⁷⁰ Only then will a special relationship be created between the foreseeable potential victim and the state such that liability may be imposed. By this holding, an obligation will exist only when the degree of risk is at its maximum; therefore, the decision results in an extension of governmental immunity.

67. Justice Tobriner believed that the legislature has evidenced its intent by refraining from enacting any further legislation in response to *Johnson* and *Tarasoff*. The implication is that the legislature approves of the trend to find special relationships giving rise to duties to warn, rescue, or otherwise control the conduct of another. *Id.*

68. 27 Cal. 3d at 752-54, 614 P.2d at 734-35, 167 Cal. Rptr. at 76-77.

69. See note 53 *supra* and accompanying text.

70. 27 Cal. 3d at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77.

Although the court insisted its decision must be based on a balancing between the competing interests of an effective rehabilitative and probationary system, and the safety of the general public,⁷¹ the *Thompson* decision tends to balance in favor of the state.

III. COMMUNITY PROPERTY

A. DETERMINATION OF SEPARATE PROPERTY INTEREST

1. *Community Installment Payments Made on Separate Property After Marriage: Moore v. Moore*

The California Supreme Court enunciates a formula by which the Community essentially "buys in" to separate property purchased by one spouse before marriage by making community installment payments. The flexibility of the formula and a detailed exposition of its operation is examined.

I. INTRODUCTION

The California Supreme Court ruled¹ that where community funds are used to make installment payments on property purchased by one spouse prior to marriage, the community has a pro tanto interest in such property. That interest is equal to the ratio between the amount paid with separate funds and the amount paid with community funds. The significance of the court's decision is that the community is deemed to have no recoverable interest in community funds paid for interest, taxes, and insurance.² More importantly, the court delineates a precise formula to be used in determining the proper amounts to be designated as community property and separate property.³ The nature of this formula and its underlying rationale will be examined.

In 1966, approximately eight months prior to her marriage, Lydie Moore purchased a house, taking title in her name alone. A down payment of \$16,640.57 was made and a loan was secured for the remaining \$40,000.00. Prior to her marriage, Lydie made seven payments which reduced the principal amount due on the loan by \$245.18.

Subsequent to their marriage, Lydie and David Moore lived in the house until their separation in 1977. Throughout this period

71. *Id.* at 750-51, 614 P.2d at 732-33, 167 Cal. Rptr. at 74-75.

1. In re Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980). The opinion was written by Justice Manuel with Justices Tobriner, Mosk, Clark, Richardson, Newman, and Chief Justice Bird all concurring.

2. See notes 25-26 *infra* and accompanying text.

3. See note 33 *infra* and accompanying text.

(1966-1977) all payments were made with community property funds which further reduced the principal amount due on the loan by \$5,986.20. After the 1977 separation, Lydie continued to live in the house while making payments with her separate property totalling \$581.07.

At the dissolution hearing, the trial court determined the residence to be Lydie's separate property; however, the community was deemed to have developed an interest in it to the extent that payments were made with community funds during marriage.⁴ The ownership interest was to be determined according to the following ratio:

$$\frac{\text{the reduction of principal resulting from the payment of community property funds}^5}{\text{the reduction of principal resulting from the payment of separate property funds}}$$

The trial court allowed no credit for payments made toward interest on the loan, taxes, or insurance.

On appeal, the parties agreed that the community had acquired an interest in the house, however, they disagreed on how that interest was to be determined. Appellant David Moore contended that the determination of the community property interest should be based upon the full amount of payments made, including interest on the loan, taxes, and insurance, rather than by the amount of payments which merely reduced the principal. Respondent Lydie Moore did not appeal.⁶

4. 28 Cal. 3d at 370, 618 P.2d at 209, 168 Cal. Rptr. at 663.

5. At the time of trial the total principal paid was \$23,453.02 with a balance owed of \$33,187.55. The market value of the home was \$160,000.00 with an equity therein of \$126,812.45. The trial court determined the community interest by dividing the community contribution by the total principal paid, or $\$5,986.20 \div \$23,453.02 = 25.5242\%$. Multiplying the equity in the house by the percentage resulted in the share attributable to the community or $25.5242\% \times \$126,812.45 = \$32,367.86$.

Lydie's separate property interest was similarly calculated by dividing her separate contribution by the total principal paid, or $\$17,466.82 \div \$23,453.02 = 74.4758\%$. When multiplied by the equity, Lydie's separate property share was determined to be $74.4758\% \times \$126,812.45 = \$94,444.59$. See 27 Cal. 3d at 370, 618 P.2d at 209, 168 Cal. Rptr. at 663.

6. The formula the court proposed would reduce the community property interest from 25.5242% to 10.57% resulting in a detriment to David. Had Lydie appealed, the court would have ordered an adjustment of the division in her favor. Since the trial court had calculated in the appellants favor, the award was not modified.

Either Lydie's counsel was not aware of the *Lucas* and *Aufmuth* decisions, see notes 16 and 21 *infra*, or they did not feel they were controlling. There is no indication that the *Lucas* and *Aufmuth* formulas were argued to the court. Apparently the court chose to employ them upon their own motion. 28 Cal. 3d at 374, 618 P.2d at 212, 168 Cal. Rptr. at 666.

The court was asked to decide if all such payments made, including those made toward interest, taxes, and insurance, should be considered in determining the community and separate property interests. Additionally the court was asked to devise a formula which would permit a precise division of the community interest.

II. HISTORIAL ANALYSIS

The leading case dealing with apportionment of interests between separate and community property is *Vieux v. Vieux*.⁷ In *Vieux* the husband contracted before marriage to buy a piece of property and made a down payment on the purchase price. After marriage, community funds were utilized for payment of the principal due, plus interest and taxes. The court of appeal held the community owned a share of the property equal to the ratio of the amount paid with community funds divided by the total purchase price. The *Vieux* holding included interest and taxes in its calculation, but the issue had not been expressly considered by the court.⁸

In 1953, the court of appeal decided *Forbes v. Forbes*.⁹ The *Forbes* court rejected the idea that the community was only entitled to reimbursement¹⁰ of installment payments made with community funds on property originally purchased prior to marriage. Relying on *Vieux*, the court held the community had a "pro tanto

7. 80 Cal. App. 222, 251 P. 640 (1926). The *Vieux* case considered an installment purchase situation, where title did not vest until all payments were completed. *Moore* considered a purchase money mortgage situation with title vesting in Lydie at the time of purchase. The *Moore* court did not note this distinction. It is likely the court did not address the installment purchase situation because no loan was present that had to be characterized in order to determine the status of the property. The loan and, therefore, the property was clearly separate since it was purchased prior to marriage. The community would simply have an interest in ratio that community payments bore to payments made with separate funds. *In re Estate of Neilson*, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962).

8. The *Moore* court would later reject the *Vieux* case as a controlling precedent on this basis. See note 26 *infra* and accompanying text.

9. 118 Cal. App. 2d 324, 257 P.2d 721 (1953).

10. If the community payments were considered loans to repay the purchase price of the separate property of one spouse or improvements on the separate property of one spouse, then the community traditionally would be able to seek reimbursement and not otherwise share in the investment. CAL. CIV. CODE § 5125 (West Supp. 1980); *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972) (improvement on one spouse's separate property with community funds will not change the character of the property; the community may only seek reimbursement); *Wheeland v. Rodgers*, 20 Cal. 2d 218, 124 P.2d 816 (1942) (community is entitled to reimbursement for improvements on one spouse's separate property). See also *In re Marriage of Warren*, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (1972) (where one spouse uses community property to improve the other's separate property, reimbursement may occur only by agreement).

community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds."¹¹

The rule in *Vieux* and *Forbes* has been construed to exclude any payments for interest and taxes. In *Bare v. Bare*¹² the court of appeal held "the community is entitled to a *minimum* interest in the property represented by the ratio of the community *investment* to the total separate and community *investment* in the property."¹³

The Court in *Bare* also noted that in the event the fair market value of the property appreciated, the community would be entitled to participate proportionately in the increased value. This demonstrated that the use of community funds was, in fact, an *investment*¹⁴ in the asset as community property and not merely a *loan* made for the purchase of separate property. Therefore, the community was entitled to share in the appreciation.¹⁵

Recently, the court of appeal, in *In re Marriage of Aufmuth*¹⁶ decided that the character of a loan must be considered in determining the respective interests of community and separate property. In *Aufmuth* the parties purchased a house during their marriage. The wife made the initial down payment using her separate property funds only. The balance was paid with a loan secured by the purchased property. Title was taken in the names of both spouses as community property.¹⁷ The wife contended that

11. *Forbes v. Forbes*, 118 Cal. App. 2d at 325, 257 P.2d at 722. See also *In re Estate of Neilson*, 57 Cal. 2d 733, 371 P.2d 795, 22 Cal. Rptr. 1 (1962).

12. 256 Cal. App. 2d 684, 64 Cal. Rptr. 335 (1967).

13. *Id.* at 690, 64 Cal. Rptr. at 339 (emphasis added); accord *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972).

The *Moore* court did not expressly say so, but appeared to place great emphasis on the *Bare* decision's words "minimum" and "investment" to require dividing the least amount possible directly relating to the equity of the property. 28 Cal. 3d at 372, 618 P.2d at 210, 168 Cal. Rptr. at 664. Only that amount that contributed to the property as an asset would be divided. Maintenance payments were held to be non-divisible.

14. The *Bare* decision showed the community was essentially buying in to the property and not merely improving it. Thus, mere reimbursement for expenditures under *Jafeman* and *Wheeland v. Rodgers* was not proper, but an actual sharing of profits and ownership privileges was appropriate.

15. The community, as a co-tenant of the property after the buy-in, should be able to share in the appreciation. Accord *In re Marriage of Jafeman*, 22 Cal. App. 3d at 256-57, 105 Cal. Rptr. at 491.

16. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

17. The dispute centered on the character of the property. Although a presumption may be raised, the form of the instrument under which the parties hold

the house should be entirely her separate property subject to the community's right to reimbursement.¹⁸ She argued that where the down payment was made entirely with separate property funds and the balance paid with a loan secured by the purchased property, the purchased property should be classified as separate property. The court held this rationale failed to truly consider the character of the loan.¹⁹ Relying on the intent-of-the-creditor test, the court held that the loan was community property and, therefore, the community had an interest in the purchased property.²⁰

The California Supreme Court considered the division of property in another mixed consideration case, *In re Marriage of Lucas*.²¹ In *Lucas*, the court approved of the scheme developed by

title is not conclusive of the status of the property. CAL. CIV. CODE § 5110 (West Supp. 1980); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (form of title is not conclusive where property is purchased with mixed consideration after marriage); *Robertson v. Willis*, 77 Cal. App. 3d 358, 143 Cal. Rptr. 523 (1978) (presumption that property acquired by wife in writing before 1975 is rebuttable and may be overcome by circumstantial evidence).

18. Mrs. Aufmuth contended the community payments were loans or improvements to her separate property and should only be compensated by repayment rather than awarding a pro tanto interest in the appreciated property value. See notes 10 and 14 *supra*.

19. *In re Marriage of Aufmuth*, 89 Cal. App. 3d at 457, 152 Cal. Rptr. at 675.

20. Mrs. Aufmuth asserted that the loan encumbered the house and the house was separate property. Therefore, the loan was separate property. This argument presumes the house to be separate property based solely on the separate character of the down payment. Under *Gudelj v. Gudelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953), and *Ford v. Ford*, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (1969), the intent of the creditor, or on what he relied in extending credit, will color the proceeds of the loan with the same character. In the absence of a showing of clear reliance on separate property, loan proceeds are presumed to be community property. *In re Marriage of Aufmuth*, 89 Cal. App. 3d at 455-56, 152 Cal. Rptr. at 674.

In *Aufmuth*, the loan was found to be based upon the credit of the community. Although no direct evidence was submitted to support this finding, the court inferred this from surrounding facts. The wife had no separate property except her down payment. She was unemployed and the husband was a practicing attorney with his income the sole source of familial support. The loan proceeds were, therefore, deemed a community contribution to the purchase of the house. This resulted in Mrs. Aufmuth owning a separate share equal to the ratio that her separate down payment bore to the total purchase price. Therefore, the property division substantially depended on the characterization of the loan. *Id.* at 456-57, 152 Cal. Rptr. at 674-75.

21. 27 Cal. 3d 808, 614 P.2d 283, 166 Cal. Rptr. 853 (1980). Mrs. Lucas was held to be vested with a separate property interest for her separate contribution to the purchase of a house. The fact that no agreement had been reached between the parties on this point was unimportant since the funds were clearly traceable to the wife's separate holdings. See *In re Marriage of Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 89 (1975) (separate interest in property may be established by tracing contributing funds to their source).

Lucas resolved a dispute between *In re Marriage of Björnstead*, 38 Cal. App. 3d 801, 113 Cal. Rptr. 576 (1974), which allowed only reimbursement for separate property contributions to community purchaser and *Aufmuth*, which awarded a pro tanto interest. The court felt *Aufmuth* was more persuasive. 77 Cal. 3d at 812-13, 614 P.2d at 287, 166 Cal. Rptr. at 853.

the court of appeal in *Aufmuth*, whereby the interest in the appreciation of equity was apportioned pro rata between separate and community property.²² *Lucas* dealt with a purchase after marriage, while *Moore* concerns subsequent community payments made on property purchased by one spouse before marriage. Whereas *Lucas* turned on the issue of a possible transmutation²³ of property by the parties, *Moore* is primarily concerned with the proper characterization of the premarital loan obtained to purchase the property. The *Lucas - Aufmuth* formula is still applicable to the situation found in *Moore*.²⁴

III. ANALYSIS OF THE *MOORE* DECISION

Appellant David Moore asserted that the interest on the purchase loan, taxes, and insurance should be taken into account when computing the community interest of the community in mixed consideration cases. He relied on *Vieux*²⁵ because it had included interest and taxes in its calculation. The California Supreme Court noted that although the *Vieux* decision had made this inclusion, it had not actually considered the propriety of including interest and taxes. For this reason, the court did not consider *Vieux* to be controlling on this issue.²⁶ After examining cases decided after *Vieux*, such as *Bare* and *In re Marriage of Jafeman*,²⁷ the court decided to continue to apply the rule that excluded interest and taxes when determining the character of property.

Appellant argued that interest and taxes should be included in

22. For a detailed explanation of the *Lucas-Aufmuth* formula, see note 33 *infra* and accompanying text.

23. See *In re Marriage of Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975) (no formalities are required between spouses to change status of property). See also *Wikes v. Smith*, 465 F.2d 1142 (9th Cir. 1972) (husband and wife may agree to change status of property without formalities).

24. See note 38 *infra* and accompanying text.

25. See note 7 *supra*.

26. Although the trend had been to exclude taxes and interest from the dissolution computation, as demonstrated by *Bare* and *Jafeman*, see note 12 *supra* and accompanying text, the *Moore* decision would expressly hold interest and taxes are not to be included in any formula to divide property. Therefore, the *Vieux* decision no longer has any precedential value in this area. As the court noted, the issue in *Vieux* was whether or not the community should be given any interest at all for contributions toward a spouse's separate property, not the suitability of including taxes and interest in the computation. 28 Cal. 3d at 371, 618 P.2d at 210, 168 Cal. Rptr. at 664.

27. 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972).

the computation since they represent a substantial portion of the purchase price. The court disagreed since interest and taxes neither increase the equity value of the property²⁸ nor contribute to the capital investment in the property, and are not recovered when the property is sold. Interest and taxes were merely one type of a variety of expenses one must expend to maintain property. "Upon dissolution it is the court's duty to account for and divide the assets and the debts of the community. Payments made for interest, taxes, and insurance are neither."²⁹ The court felt *Lucas* would require the community to be charged for its use of the property if such items were considered in assessing its interest. For these reasons the California Supreme Court did not feel it was appropriate to depart from the present rule which excludes interest and taxes when determining the character of property.³⁰

IV. THE *LUCAS-AUFMUTH* FORMULA

The trial court used a formula that was based upon a statement in *In re Marriage of Jafeman*³¹ that was interpreted to mean that property interests are to be determined by considering the allocable equity contributions only, without considering the loan contribution.³² Although the *Moore* court noted the possible suitability of this formula when the obligation on the property has been fully

28. Payment of taxes can actually remove an encumbrance on property, resulting in an increase in equity. The community should at least be entitled to reimbursement for such expenditures under the improvement doctrine. *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972). The court did not expressly discuss reimbursement, but may have indicated it is allowable, although the community in *Moore* had been sufficiently reimbursed by its use of the property. 28 Cal. 3d at 372-73, 618 P.2d at 211, 168 Cal. Rptr. at 665. The court noted if taxes and interest "were considered to be part of the community interest, fairness would require that the community be charged for its use of the property." *Id.*

29. 28 Cal. 3d at 372, 618 P.2d at 211, 168 Cal. Rptr. at 665.

30. The court may have held in this manner because it felt the community had been sufficiently reimbursed. It is not clear what should occur when the community has made interest, tax, and insurance payments upon property of which it has had no use or benefit. The court held the *Moore* community to be reimbursed by use. See note 48 *infra*.

31. 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972). In *Jafeman*, the parties made community payments on a house originally owned by Mr. Jafeman before marriage. Upon dissolution, the court awarded interests to the community and separate property in the ratio that payments made with separate property bore to payments made with community property. *Id.* at 256, 105 Cal. Rptr. at 491. This appears to be the formula relied upon by the trial court in *Moore*. In contrast, the supreme court compares respective payments made to the total purchase price.

32. The misconstrued section of *Jafeman* reads as follows: "The community interest is determined by comparing the ratio of the community investment to the total separate and community investment in the property." *Id.* at 256, 105 Cal. Rptr. at 491. The trial court apparently did not see any requirement of viewing the loan as a separate contribution.

repaid, it noted the inconsistency of applying such a formula under the *Lucas* and *Aufmuth* standards when portions of the loan remain unpaid.³³

In *Moore* the loan and the down payment were based on separate property assets and were, therefore, separate property contributions. In such a situation, the *Lucas-Aufmuth* formula³⁴ would be applied as follows:

1. The separate property percentage interest equals the down payment plus the full amount of the loan *minus* the amount by which the community contribution reduced the loan principal. The total is then divided by the purchase price in order to reach the separate property percentage share;³⁵
2. The separate property interest would be the amount of capital appreciation attributable to the separate funds plus the amount of equity paid by separate funds;³⁶

33. The court believed that the proceeds from a loan based on separate property are separate. The property purchased with such proceeds also remains separate property. To fail to consider the loan as a separate contribution denies its role in the purchase of the property. The formula used by the trial court penalizes the separate estate for obtaining a loan to purchase property. The greater the loan and the lesser the down payment, the greater the penalty becomes. *Lucas* and *Aufmuth* have clearly shown the loan contribution must be considered. 29 Cal. 3d at 816-17, 614 P.2d at 289-90, 166 Cal. Rptr. at 857-58.

34. The following symbols will be used to demonstrate the court's formula along with the corresponding amounts related to the *Moore* cases where appropriate:

P(s) = separate property percentage interest;

P(c) = community property percentage interest;

D(s) = down payment = \$16,640.57;

L(s) = loan amount = \$40,000.00;

C(s) = total separate cash contribution to purchase without loan amount = \$17,466.82 (This is the total of down payment, pre-marriage installment payments, and post separation installment payments, or \$16,640.57 + \$295.18 + \$581.07 = \$17,466.82);

C(c) = total cash contribution by the community = \$5,986.20;

A = net appreciation = \$103,359.43;

FMV = fair market value = \$160,000.00;

AB = purchase price of the property = \$56,640.57;

CP = community property share;

SP = separate property share.

28 Cal. 3d at 373-74, 618 P.2d at 211, 168 Cal. Rptr. at 665 (the answers to the mathematical computations are derived from the cited authority; but the computations are the author's own work showing how the answers were derived).

35. Demonstration of the court's formula will be shown both symbolically and using dollar amounts from the *Moore* case.

$[(D(s) + L(s)) - C(c)] + AB = P(s)$

$[(16,640.57 + 40,000) - 5,986.20] + 56,640.57 = 89.43\%.$ *Id.*

36. $FMV - AB = A$

3. The community property percentage interest is equal to the amount by which the community contribution reduced the principal divided by the purchase price;³⁷ and
4. The community property interest would be the amount of capital contribution attributable to community property funds plus the amount of the equity paid by the community.³⁸

Since the formula considers the loan as a separate contribution prior to marriage and community contribution subsequent to marriage, the formula is sufficiently broad to include the situations presented by both *Lucas* and *Moore*.³⁹

V. CASE IMPACT

The court's formula places an emphasis on the separate or community contribution in relation to the total purchase price and not the relation the separate and community contributions bear toward each other.⁴⁰ The property itself is deemed to be separate or community based upon the character of the loan. Essentially, all other subsequent contributions of a different character will be "buying in" to the property.⁴¹ The extent of this buy-in will be equal to the percentage paid toward the total purchase price up to the time of dissolution. Thus, the party buying in to the property will be able to take advantage of any appreciation that results. This method is preferable to a reimbursement for money expended as a mere loan to the other party.

The effect of the *Moore* decision will be that spouses will have to remain married longer before the community develops a substantial interest in previously purchased separate property. This will likely lead to more just results, particularly in market conditions where property appreciates at a meteoric rate in a fairly

$$(P(s) \times A) + C(s) = CP$$

$$160,000 - 56,640.57 = 103,359.43$$

$$(89.43\% \times 103,359.43) + 17,466.82 = 109,901.16. \text{ } Id.$$

$$37. C(c) + AB = P(c)$$

$$5,986.20 + 56,640.57 = 10.57\%. \text{ } Id.$$

$$38. (P(c) \times A) + C(c) = SP$$

$$(10.57\% \times 103,359.43) + 5,986.20 = 16,911.29. \text{ } Id.$$

39. See notes 21-24 *supra* and accompanying text.

40. *Id.* The community is buying an interest in property already owned as separate property, not contributing to a purchase in which title will pass upon completion of the payments. See note 7 *supra*. At dissolution, the community will own a percentage equal to the amount it has "purchased" from the whole. Separate contributions after purchase are essentially irrelevant since the property is separate in the beginning.

41. The community has purchased an increasing interest with each payment and is entitled to much more than mere reimbursement for improvements. See generally *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979). See notes 15-16 *supra*.

short period of time.⁴²

In opposition to the trial court's decision, the California Supreme Court placed greater emphasis on the initial loan and its character. The character of the initial loan, in conjunction with the character of the down payment, will determine the character of the purchased property. Characterization of the property in this manner is important in that it will determine if the community is making payments toward property which already constitutes a community asset, or is "buying in" to property which constitutes one spouse's separate property.⁴³

This will require the parties to establish more clearly the nature of the loan under the intent-of-the-creditor test established in *Ford v. Ford*.⁴⁴ The extent of ownership of property may turn on not what portion was paid with separate as opposed to community funds, but upon whose credit the lender relied in making the loan. Difficult situations may arise when loans are not clearly based on one type of property or another, or are based upon a mixture of community and separate assets not clearly allocated at the time of the loan.⁴⁵ Although some difficulty may be encountered in ascertaining the nature of the loan, a more equitable divi-

42. A spouse married only a short time may acquire a substantial interest by her interest in the community if the old formula is followed. Suppose H before marriage purchases a house with separate property under a 40 year mortgage in year 1. H marries W in year 20 but separates in year 22. Payments made during marriage are made with community property. Under the old formula the community owns 2/22 or 1/11 when only payments to date of dissolution are considered. Under the *Lucas-Aufmuth* formulation the community owns 2/40 or 1/20 when payments are considered against the total purchase price. This may be more fair, especially if the property has appreciated greatly in later years. It also better accounts for inflation when the early payments made by H were of greater value.

43. As shown in the *Aufmuth* case, the characterization of the loan as an initial contribution will greatly vary the interest in the property upon dissolution. If Mrs. Aufmuth had succeeded convincing the court that the loan proceeds were separate property, Mr. Aufmuth's interest would have been vastly diminished. See notes 18 and 20 *supra*.

44. 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (1969) (property purchased by husband with loan was separate property where loan was secured by hypothecation of husband's separate real estate). This holding was later approved in *Jafeman* where it was determined the assets upon which a creditor relies in extending credit will determine the character of the loan. See note 20 *supra*.

45. In the *Aufmuth* case it was not clear upon what security the loan was issued. The court was required to surmise the lender's intent from the surrounding facts. See note 20 *supra*. In light of *Moore's* emphasis on the initial character of the loan, if a party seeks a separate loan during marriage it would seem appropriate to include language to that effect in the loan instrument in order to insure the purchased property as being classified as separate.

sion should result from its consideration.⁴⁶

The *Moore* decision is significant in that it settles any dispute based upon the *Vieux* decision that interest and taxes should be included in the determination of dissolution property settlements.⁴⁷ This may reach an odd result in the case of taxes rising with the appreciated assessed value of the property and the new "floating" interest loans.⁴⁸ Tax payments essentially remove an encumbrance from property increasing its equity. This may be considered an improvement for which the community should be compensated. It may be argued that the result is still equitable since the community will share in the appreciation upon which the increased taxes are based.⁴⁹

The exclusion of interest payments may not enjoy the same rationale. This may especially be the case when "creative financing" is employed and a floating interest rate⁵⁰ is utilized. Due to the nature of the floating rate, the interest paid on the portion purchased with community funds may be much greater than the interest paid with separate funds. Since the floating interest rate is not tied to appreciation, but to such things as the prime interest rate, no similar compensation may be realized for interest expenses. Under the doctrine of improvements, it would seem reim-

46. See notes 32, 41, and 42 *supra* and accompanying text.

47. 28 Cal. 3d at 371, 618 P.2d at 210, 168 Cal. Rptr. at 664. *Vieux* included taxes and interest in the computation without considering the suitability of doing so. See note 8 *supra* and accompanying text.

48. A "floating" interest loan would be one in which the interest would vary at a corresponding level to some market factor such as the prime interest rate. See Note, *McConnel v. Merrill Lynch, Pierce, Fenner & Smith, Inc.: New Tests for Variable-Interest Loans*, 30 HASTINGS L. J. 1843 (1979). Responding to inflation and the demand for housing in California, the legislature has already provided statutory standards and requirements for variable interest rate loans in real estate mortgages. See CAL. CIV. CODE § 1916.5 (West Supp. 1980). For an exposition of the uses and advantages of creative financing, see Comment, *The Variable Interest Rate Clause and Its Use in California Real Estate Transactions*, 19 U.C.L.A. L. REV. 468 (1972).

49. The Court did not address the problem of reimbursement for taxes and interest paid by the community on a spouse's separate property. It may have refrained from doing so in *Moore* due to community's use of the property. It is not entirely clear what would happen to the same interest and tax payments made on separate property of which the community did not have the benefit of using. Such a situation may arise concerning investment property held out of state. It seems possible the improvement doctrine under *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972), and *Wheeland v. Rodgers*, 20 Cal. 2d 218, 124 P.2d 816 (1942), would require reimbursement. If tax and interest payments are made along with payments on the principal such that the community is buying in to the property, the interest and tax payments may be considered as applying to that interest the community has purchased. In such cases an apportioned reimbursement would seem proper. The reimbursement should be determined according to the share purchased by the community and that amount retained in separate ownership.

50. See note 47 *supra* and accompanying text.

bursement should be possible.⁵¹

VI. CONCLUSION

In the *Lucas*, *Aufmuth*, and *Moore* decisions the California Court of Appeal and Supreme Court have adopted a new, more complex formula which should provide more equitable property division. The formula is designed to be employed in mixed consideration cases, especially those involving purchase loans which have not yet been fully repaid upon dissolution.

These decisions give special weight to the character and role of the initial loan in purchasing property. Subsequent payments from community funds on property classified as separate due to the separate character of initial loan proceeds, will essentially "buy in" to the property in proportion to the ratio that the total payments bear to the initial purchase price. Only funds paid to reduce the principal will be considered; there will be no consideration of any payment of interest, insurance, or taxes. The formula will turn on the relation between payments of principal and the total principal purchase price, not on the relation between the respective sums paid and the current reduction of principal as the trial court had held.

Although left with a somewhat more complicated formula, it is one that is not beyond the practitioner's, or more importantly, the layman's comprehension.⁵²

IV. CALIFORNIA CONSTITUTION

A. ARTICLE VI, § 16(C)

1. *Judicial Vacancies: Stanton v. Panish; Chatterton v. Eu*

51. This area may also lend itself to an apportioned reimbursement type theory since the community may have paid more interest in ratio to the portion it receives for payment on the principal than that attributable to the separate property.

52. It is also important that the layperson involved in the dissolution proceeding understand the rationale behind the new formula. Often the recently divorced individual expresses that he was treated unfairly in a divorce proceeding. Since the court's formula accounts for the *full* separate or community property investment by including the original loan as a contribution, the overall division of property should be more equitable. Therefore, if the layperson can understand the *Lucas-Aufmuth* formula in its component parts, confidence in the community property system should be insured.

In *Stanton v. Panish*,¹ and *Chatterton v. Eu*,² the Supreme Court of California interpreted California Constitution Art. VI § 16 Subd. (c). The language in question states that, "a vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins." Despite what the dissent pointed out as the clear language of the provision,³ the court interpreted it by making a distinction between vacancies which occur before the electoral process has begun and those which occur after it has begun. The court believed that the provision was only intended to relieve an appointee from the burden of standing for election immediately. When a vacancy arose early in the last year of an incumbent's term and if the appointee assumed office before one or more potential candidates qualified⁴ then no election is required. In these two cases candidates had already qualified for a runoff election in the November election when the vacancies occurred.⁵

1. 28 Cal. 3d 107, 615 P.2d 1372, 167 Cal. Rptr. 107 (1980). A superior court judge, whose tenure terminated at the end of 1980, announced in January, 1980 that he would not run for reelection. The petitioner, a candidate in the June primary, qualified along with one other candidate for the November runoff election. In June, after the primary, the incumbent judge retired. Pursuant to Cal. Const. Art. VI, § 16(c), the petitioner was informed that the office would not appear on the November ballot. Petitioner sought a writ of mandate to compel the registrar to proceed with the election and to compel the Secretary of State to certify the candidates for the election.

2. 28 Cal. 3d 123, 615 P.2d 1381, 167 Cal. Rptr. 595 (1980). A superior court judge, whose term expired at the end of 1980, announced in November, 1979 that he would not be seeking reelection. The petitioners and three others subsequently qualified as candidates for the June, 1980 primary election. There was no absolute majority, therefore, the petitioner qualified for the runoff election in November. The incumbent judge retired in June, after the primary election. Petitioner was informed that Cal. Const. Art. VI, § 16(c) precluded certification of the office or candidate, for the November election. The petitioner sought a writ of mandate compelling the registrar to proceed with the election and the Secretary of State to certify the office and candidates for the November election.

3. Despite what the dissent pointed out as the clear language of the provision, "[i]n the present case, the incumbent judge retired in June of 1980. Under the clear language of the constitution, that vacancy must be filled by the exercise of the Governor's appointment power. The appointee must then stand for election June of 1982." *Stanton v. Panish*, 28 Cal. 3d 107, 116-17 (1980).

4. 28 Cal. 3d at 113, 615 P.2d at 1375, 167 Cal. Rptr. at 587. See *Pollack v. Hamm*, 3 Cal. 3d 264, 425 P.2d 213, 90 Cal. Rptr. 181 (1970). The court held that only if the vacancy arose in the year of expiration of an elected incumbent's term, or if an elected incumbent should die in an election year at a time when it is no longer possible to carry out the election process, can more than six years elapse between election or opportunity of election for the office. See also *Barber v. Blue*, 65 Cal. 2d 185, 417 P.2d 401, 52 Cal. Rptr. 865 (1966) (established the general rule that an appointee need not stand for election in the year of the accrual of the vacancy).

5. In these two cases, candidates had already qualified for a runoff election in the November election when the vacancies occurred. In *Stanton*, the incumbent superior court judge announced his retirement on January 30, 1980, to become ef-

Therefore, it was ruled that this provision did not operate to cause cancellation of the upcoming election. This seems to be in direct contradiction to the language in the provision.⁶ However, the court found that the provision should be read in conjunction with Art. VI section 16(b) of the California Constitution, which commands that all judges (other than those of the Supreme Court and Court of Appeal) be elected in general elections, and Art. VI section 16(c), which sets the terms for judges of the superior court at six years.⁷ Read in conjunction with these two sections, the court held the provision in question was an exception to the general rules enumerated and would only apply when the elective process had not already begun.⁸

V. ADMINISTRATIVE LAW

A. STANDING TO SUE

1. *Board Members: Carsten v. Psychological Examining Committee*

The California Supreme Court, in the case of Carsten v. Psychological

fective after June 21, 1980. In *Chatterton*, the incumbent superior court judge announced his noncandidacy on November 5, 1979 and retired June 30, 1980.

6. This seems to be in direct contradiction to the language in the provision. See *Fields v. Eu*, 18 Cal. 3d 322, 326, 556 P.2d 729, 731-32, 134 Cal. Rptr. 367, 369-70, (1976) (if a vacancy occurs at anytime in an election year, the office will not be placed on the ballot until the next election year, i.e. two years later); *Anderson v. Phillips*, 13 Cal. 3d 733, 739, 532 P.2d 1247, 1251, 119 Cal. Rptr. 879, 883 (1975) (purpose was to eliminate the requirement that an election be held if the vacancy occurs during the last year of the incumbent judge's term).

7. 28 Cal. 3d at 115, 615 P.2d at 1376-77, 167 Cal. Rptr. at 588-89. The court indicated that if respondent's argument was to prevail, incumbent judges would resign or retire if they were unsatisfied with the candidates or election results. Furthermore, it would be unfair to other candidates who had expended time and resources on the election.

8. The court felt the provision in question was an exception to the general rules enumerated and would only apply when the elective process had not already begun. See *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1057, 104 Cal. Rptr. 761, 769 (1972) (the literal language of a statute may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers); *Serrano v. Priest*, 5 Cal. 3d 584, 596, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609, (1971) (constitutional provisions should be reasonably construed and if possible, harmonized to avoid conflict); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (constitutional provisions should be construed reasonably if possible to avoid absurd and unfair results).

Examining Committee,¹ held that a member of an administrative board was not a citizen-taxpayer for purposes of establishing standing to sue the very board on which she sat, because the roles of citizen-taxpayer and the board member were deemed incompatible.

I. INTRODUCTION

A member of the Psychology Examining Committee of the Board of Medical Quality Assurance² (hereinafter PEC) petitioned for a writ of mandamus to compel the committee to comply with the California Business and Professions Code section 2942.³ The committee under section 2942, has an obligation to assure that only qualified persons are licensed to practice psychology in the State of California. This statutory obligation is accomplished by PEC's administration of examinations to persons seeking psychology licenses.

The code states that only applicants receiving a score of at least seventy-five percent on both the written and oral portions of the examination may obtain a license. However in 1977, PEC began utilizing the national average as the passing score rather than the statutorily prescribed average of seventy-five percent. PEC also substituted an objective test for the written examination. As a result of employing the national average for determining a passing grade, applicants that were statutorily disqualified to receive licenses to practice psychology nevertheless received licenses.⁴ The overall effect was to lower the requirements for the acquisition of a psychology license by reducing the passing grade for the examination.

The trial court sustained the committee's demurrer without leave to amend. Carsten then asked the court of appeal for extraordinary relief to compel the lower court to accept jurisdiction of the matter.⁵ The court of appeal found that the petitioner was

1. 27 Cal. 3d 793, 614 P.2d 276, 166 Cal. Rptr. 844 (1980). Justice Mosk wrote for the majority with Justices Newman, Clark, and Manuel concurring. Justice Richardson wrote the dissent with Chief Justice Bird and Justice Tobriner concurring in the dissent.

2. Petitioner, Arlene Carsten, was appointed by the Governor to serve a four-year term on the committee. *Id.* at 805, 614 P.2d at 277, 166 Cal. Rptr. at 851.

3. CAL. BUS. & PROF. CODE § 2942 (West 1974): "The committee may examine by written or oral examination or both. The examination shall be given at least twice a year at the time and place and under such supervision as the committee may determine. A grade of 75 percent shall be a passing grade." The 1980 supplement adds to the above quoted section that "Examinations for a psychologist's license may be conducted by the committee under a uniform examination system, and for that purpose the committee may make such arrangement with organizations furnishing examination material as may in its discretion be desirable."

4. Under the national means measure of passage, applicants scoring as low as 67.5% were licensed. 27 Cal. 3d at 796, 614 P.2d at 278, 166 Cal. Rptr. at 346.

5. It is within the discretion of the court whether to accept jurisdiction of the

only incidentally a board member, and was able to sue in her capacity as a citizen-taxpayer. The court ruled that under the circumstances, the petitioner had standing to sue and was a "beneficially interested" party within the meaning of the California Civil Procedure Code sections 1085 and 1086.⁶ The court of appeal also held that the matter was not a political issue, thus it was justiciable.⁷ Despite the fact that Carsten was given standing to sue, the appellate court denied the application for the writ of mandamus.⁸

On appeal, the California Supreme Court held that Carsten did not have standing to sue, as she was not a "beneficially interested" party within the meaning of the California Civil Procedure Code requirements. The high court affirmed the portion of the judgement denying the writ of mandamus.⁹

matter about which the writ of mandamus is sought. *Carsten v. Psychology Examining Comm.*, 97 Cal. App. 3d 110, 158 Cal. Rptr. 554 (1979) (the responsibility of issuing a writ of mandamus rests in the wise discretion of the court); *McDonald v. Stockton Metropolitan Transit Dist.*, 36 Cal. App. 3d 436, 111 Cal. Rptr. 637 (1974) (exercise of jurisdiction in mandamus proceeding rests to a considerable extent with the discretion of the court, weighing the applicant's need for relief and his beneficial interest, against the public need for enforcement of the official duty); *American Friends Service Dist. v. Procunier*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973) (whether a writ of mandamus is to issue depends on the wise discretion of the court).

6. See CAL. CIV. PROC. CODE §§ 1085, 1086 (West 1980). Section 1085 reads in reference to writs, that:

It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or persons, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Section 1086 states that "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."; *Carsten v. Psychology Examining Comm.*, 97 Cal. App. 3d 110, 158 Cal. Rptr. 554 (1979). Under sections 1085 and 1086 of the Code of Civil Procedure, only a beneficially interested person has standing to bring a petition for writ of mandamus, and ordinarily, this means one must have a private right to be protected or an interest other than that held by the public in general. *Taschner v. City Council of Laguna Beach*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973), held that one who has some special interest to be served or a particular right to be protected has sufficient beneficial interest to seek a writ of mandamus and an elector, taxpayer, and property owner has sufficient personal interest to challenge the validity of a building height limitation ordinance.

7. 97 Cal. App. 3d at 113, 158 Cal. Rptr. at 557.

8. *Id.*

9. 27 Cal. 3d at 795, 802, 614 P.2d at 277, 281, 166 Cal. Rptr. at 845, 849. The Cali-

II. HISTORICAL ANALYSIS

A writ of mandamus may be issued by:

any court, . . . to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded.¹⁰

While issuance of the writ of mandamus rests within the discretion of the court,¹¹ "the writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested",¹²—considering the applicants need for relief and his beneficial interest as against the public need for enforcement of the official duty.

Generally, a beneficially interested person who has standing to petition for the writ is one that has "some private right to be protected or preserved or an interest which is other than that which he holds with the public at large."¹³ The courts, however, have

fornia Supreme Court affirmed the appellate court's denial of petitioner's application for a writ of mandate. 97 Cal. App. 3d at 114, 158 Cal. Rptr. at 557. The appellate court had reversed the trial court's dismissal of Carsten's complaint after sustaining the defendant's demurrer without leave to amend. 27 Cal. 3d at 795, 614 P.2d at 277, 166 Cal. Rptr. at 845.

10. CAL. CIV. PROC. CODE § 1085 (West 1980); *accord* McDonald v. Stockton Metropolitan Transit Dist., 36 Cal. App. 3d 436, 111 Cal. Rptr. 637 (1973).

11. *See* note 5 *supra*.

12. CAL. CIV. PROC. CODE § 1086 (West 1980); Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953) (a writ of mandate will not be issued except upon the affidavit on application of the party beneficially interested); *accord* Ellis v. Workman, 144 Cal. 113, 77 P. 822 (1904).

13. 97 Cal. App. 3d at 112, 158 Cal. Rptr. at 556; *see* Board of Social Welfare v. Los Angeles County, 27 Cal. 2d 98, 162 P.2d 627 (1945). The California State Board of Social Welfare is a beneficially interested party within § 1086 of the Code of Civil Procedure, and thus could maintain mandamus seeking to compel county officials to issue duplicate welfare checks for needy persons whose checks had been cancelled. Parker v. Bowron, 40 Cal. 3d 344, 254 P.2d 6 (1953), held that a writ of mandamus will only be issued where it is shown that it is necessary to protect a substantial right and where shown that substantial damage will be suffered by petitioners if denied. As such, neither an individual who served as secretary-treasurer of a voluntary incorporated association on behalf of members of unincorporated labor organizations nor a labor council and its affiliated unions had sufficient interest to have standing for mandate proceedings seeking to compel city officials to fix wages at a price comparable to those in similar employment in the private sphere. Fritts v. Charles, 145 Cal. 512, 78 P. 1057 (1904), found that the applicant for a writ of mandamus to compel the arrest of one accused by petitioner's complaint of misdemeanor violation involving use of slot machine unlawfully was not a party beneficially interested within the meaning of the statutory requirement as he was not different in any manner from the general applicant in any prosecution of complaint. Ellis v. Workman, 144 Cal. 113, 77 P. 822 (1904). A writ of mandamus was denied because the party was not sufficiently interested. In this case, the party's land was sold by a city treasurer for failure to pay street improvement installments under a bond which constituted a lien for the amount of the bond on petitioner's property. Since the party did not claim that the bond

considerably expanded the concept of beneficial interest to include property owners, taxpayers, and voters.¹⁴

While the general rule on the issuance of a writ of mandamus requires that one have some special interest above and beyond that of the public at large, an exception has developed if the issue is one of public right or duty. In this context, the requirements of a clear and beneficial right of the petitioner and the corresponding duties of the respondent have been relaxed. Under this exception it is sufficient that the individual seeking the writ is interested as an ordinary citizen in having the laws enforced and executed.¹⁵ The Supreme Court of California noted this excep-

was illegal, the bond does not affect the petitioner's right to redeem; thus, he cannot be interested or have a substantial right protected unless the city refuses to redeem. *Potter v. City Council of Port Hueneme*, 102 Cal. App. 2d 141, 227 P.2d 25 (1951), held that generally, a private person may apply for a writ of mandamus only where he has some private or particular interest that will be served or protected, separate and distinct from that held with the public at large, and unless such special interest appears, the application should be denied.

14. 27 Cal. 3d at 796, 614 P.2d at 278, 166 Cal. Rptr. at 845. As a general proposition, state taxpayers have standing to challenge the validity of public fund expenditures by any governmental agency and even to challenge the legality of non-fiscal issues. *Taschner v. City Council of Laguna Beach*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973), found that the fact that the petitioner was a voter, taxpayer, and owner of real property was sufficient to render him a beneficially interested party for purposes of standing to obtain writ of mandamus to challenge building height limitations enacted as ordinance by initiative. *Knoff v. City and County of San Francisco*, 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 (1969), held that the petitioners' status as taxpayers made them beneficially interested parties who could maintain mandamus proceeding in a class action suit against the Board of Supervisors of San Francisco and the Assessor, where petitioners sought to compel performance of public duties which the law specifically required.

15. *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 100-01, 162 P.2d 627 (1945):

[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.

Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948), found that under certain circumstances, it is sufficient that the person seeking a writ of mandate is interested in his capacity as a citizen in having the laws executed and the duty at issue enforced. *Carsten v. Psychology Examining Comm.*, 97 Cal. App. 3d 110, 158 Cal. Rptr. 554 (1979), held that under the relevant statutes, only one who is beneficially interested has standing to prosecute an action for a writ of mandamus. While ordinarily this means one must have some private right to be preserved, an exception to such rule is recognized where the issue is one of public right and the objective of the writ is to procure performance of a public duty. *Fuller v. San Fernando Valley Mun. Water Dist.*, 242 Cal. App. 2d 52, 56, 51 Cal. Rptr. 120, 124 (1966), found that while generally a writ of mandamus is only granted where necessary to protect a substantial right and protect against substantial damage, this rule does

tion for standing if one is a citizen, taxpayer, property owner, and the like. The court, however, was silent as to the general exception allowing standing for mandate where citizens seek to have the laws enforced. The appellate court, on the other hand, also took note of the general exception, but found that the citizen had standing, and where "the question is one of both public interest and duty and requirements relating to the petitioner's rights and respondent's duties are 'relaxed.'"¹⁶

Several cases in which a petitioner seeking a writ of mandamus has been found to be beneficially interested, under the public right and duty exception to this general rule, bear mentioning. In *Board of Social Welfare v. Los Angeles County*,¹⁷ it was stated that "generally, when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same."¹⁸ This case arose when the Board of Social Welfare applied for a writ of mandamus to compel the county to issue duplicate checks on behalf of three needy welfare recipients. Similarly, in *American Friends Service Committee v. Procnunier*,¹⁹ several nonprofit organizations interested in prison reform were given standing to petition for mandamus where the petitioner was one "alleging that a government department is not complying with the law and seeking a court order compelling such compliance."²⁰ *American Friends Service Committee* was decided in reliance upon the rule stated in *Fuller v. San Bernardino Valley Municipal Water District*,²¹ that there was an exception to the general rule, requiring a petitioner for standing to have a substantial right at stake. This exception was recog-

not apply where the issue is one of public right and the writ's objective is to procure the performance of a public duty. *American Friends Service Comm. v. Procnunier*, 33 Cal. App. 3d 252 at 256, 109 Cal. Rptr. 22 at 24 (1973), stated: "Where, however, the question is one of public, as opposed to private, interest, and petitioner seeks performance of a public duty, it is said the foregoing requirements of petitioner's rights and respondent's duty have been 'relaxed.'" *McDonald v. Stockton Metropolitan Transit Dist.*, 36 Cal. App. 3d 436, 111 Cal. Rptr. 637 (1973), held that where the public need is great, the court will grant mandamus to a petitioner without a showing of personal interest where he seeks to enforce an official duty that is clear and certain. *Diaz v. Quitoriano*, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969), stated that where the question is one of public right, such as entitlement to welfare benefits, and the mandamus is sought to enforce a public duty, such as information regarding those rights, the relator does not have to show any special interest in the result because it is sufficient that he is interested as a citizen in having laws executed.

16. 97 Cal. App. 3d at 111, 159 Cal. Rptr. at 556; See note 15 *supra*.

17. 27 Cal. 2d 96, 162 P.2d 627 (1945).

18. *Id.* at 100-01, 162 P.2d at 628-29.

19. 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973).

20. *Id.* at 256, 109 Cal. Rptr. at 26.

21. 242 Cal. App. 2d 52, 51 Cal. Rptr. 120 (1966).

nized where "the question is one of public right and the object of the writ is to procure performance of a public duty."²²

While *American Friends Service Committee* and *Fuller* were appellate court decisions, the *Board of Social Welfare* case was decided by the California Supreme Court. A subsequent supreme court case noted the same exception where an applicant for a writ of mandamus sought to compel the Governor to appoint notary publics for the San Francisco region. In *Hollman v. Warren*,²³ the petitioner was an applicant for a notary commission, and the court stated that "aside from her character as an applicant for appointment as a notary it is alleged that she is a resident and taxpayer of the City and County of San Francisco. As such she is interested in having a sufficient number of notaries commissioned to act therein."²⁴

Similarly, in the case of *McDonald v. Stockton Metropolitan Transit District*,²⁵ where two bus riders sought a writ of mandamus to compel the defendant to install twenty bus stop shelters, it was noted that "when public duty is sharp and public need weighty, [a] court will grant a mandamus at behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced."²⁶ However, that court also noted that where the public need is not so compelling, the applicant for mandamus must show a more personal interest in the matter. It would seem then, that the categorization of a duty as a public interest would grant a citizen standing to obtain a writ of mandamus. Such mandamus would compel the performance of the

22. *Id.* at 57, 51 Cal. Rptr. at 124.

23. 32 Cal. 2d 351, 196 P.2d 562 (1948).

24. *Id.* at 356-57, 196 P.2d at 566.

25. 36 Cal. App. 3d 436, 111 Cal. Rptr. 637 (1973). In *McDonald*, two bus patrons sought mandamus to compel the defendant to install 20 bus stop shelters. However, the court found that mandamus was not the proper remedy to enforce contractual obligations of a public body. Here, the Federal Department of Transportation was the primary obligor, and it had never charged the Metropolitan Transit District with breach of contract which would require it to complete a project involving the building of bus stop shelters in exchange for a grant of federal funds. The federal agency had a choice of remedies on the contract which it could exercise against the defendant district. The presence of a third party, the federal government, who could exercise discretion in choosing a remedy against the defendants named in the suit, might have had an adverse effect on the petitioner's standing to enforce that same contract by mandate. There was an element of discretion involved in the case which might have rendered the mandate inappropriate because mandamus is usually issued if the magistrate has a clear ministerial function.

26. *Id.* at 436, 111 Cal. Rptr. at 637.

duty.²⁷

Also, where the duty or performance of a duty is clearly ministerial, the court will find that the exception mentioned above is applicable. For instance in *Diaz v. Quitariano*,²⁸ the court found that the county welfare department had a ministerial duty to advise every person requesting any type of public aid of their rights to apply for such benefits. Furthermore, if such persons were dissatisfied with the county's determination of their need, they were to be advised of their right to request an administrative hearing before the Department of Social Welfare.

III. CASE ANALYSIS

The California Supreme Court found that the petitioner did not have standing to sue the board on which she sat, because she was not a "beneficially interested" party. This was based on the fact that she was neither seeking a psychology license, nor in danger of losing one.²⁹ The court defined a beneficially interested party, as one with a special interest,³⁰ and the court distinguished this from those cases which recognized a citizen's standing in the enforcement of a public duty.³¹ The court further found that the petitioner acquired her knowledge about the committee's deviation from Business and Professions Code section 2942 by virtue of her membership on the board. It was in that capacity, not that of a citizen-taxpayer, that she brought the suit. Since the majority found the two roles incompatible, it held that she could not "exercise her citizen's right to sue an administrative board and . . . simultaneously serve on the same board. The two functions are manifestly incompatible; one or the other must yield."³²

While the court agreed with the petitioners argument that suits by citizen-taxpayers have been recognized where they are brought to compel a governmental entity to comply with its statutory or constitutional duty, it found that the petitioner was not en-

27. Also relevant to the determination of the *McDonald* case was the issue of discretion in the duty to be compelled. See note 24 *infra*.

28. 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969). The proceeding for the writ was brought by welfare applicants seeking to compel the county welfare department and its director to perform their ministerial duties.

29. 27 Cal. 3d at 797, 614 P.2d at 278, 166 Cal. Rptr. at 846. The typical case for mandamus is where a ministerial duty exists and one seeks to obtain a writ to review actions taken by a board. For instance, in *Cooper v. Board of Medical Examiners*, 49 Cal. App. 3d 931, 123 Cal. Rptr. 563 (1975), a psychologist sought review by a writ of administrative mandamus of the revocation of his license by the board after he was accused of administering dangerous drugs and engaging in sexual relations with three female patients.

30. 27 Cal. 3d at 797, 614 P.2d at 279, 166 Cal. Rptr. at 846.

31. *Id.* at 797-98, 614 P.2d at 279, 166 Cal. Rptr. at 846-47.

32. *Id.* at 800, 614 P.2d at 280, 166 Cal. Rptr. at 848.

titled to such an exemption because of the requirements of the California Code of Civil Procedure section 1086.³³

The majority distinguished *Board of Social Welfare v. County of Los Angeles*³⁴ where the board's role as *parens patriae* of the needy welfare recipients gave it standing on their behalf.³⁵ The *Carsten* court found that the statement in *Board of Social Welfare* that citizens had an interest in enforcing a public duty was dicta and found that the board was "unquestionably . . . beneficially interested in the result within the meaning of section 1086."³⁶ While the majority in *Carsten* found that the petitioner had no analogous interest, the court never clearly indicated why this was so and how the case differed.

The court quickly distinguished *Hollman v. Warren*³⁷ on the ground that the person seeking the writ of mandamus was, herself, an applicant for a notary's commission. This brought her within the meaning of "beneficially interested," despite the court's note about her interest as a citizen and resident of San Francisco.³⁸ The majority stated that since *Carsten* was not seeking a psychology license, she had no comparable interest.

The majority also found that *Fuller v. San Bernardino Municipal Water District*³⁹ was irrelevant because the court in that case ultimately ruled that the petitioner for the mandate had a special interest under the general rule.⁴⁰ Finally, the court distinguished *American Friends Service Committee v. Procunier*⁴¹ in a brief sentence stating the case "involved groups active in prison reform seeking invalidation of certain rules enacted under the Administrative Procedure Act; the court merely held the rules are not applicable."⁴²

Justice Richardson, in his dissenting opinion, cited each of the foregoing cases in support of the proposition urged by the petitioner; that is, where the issue is one of public interest and the

33. *Id.* at 797, 614 P.2d at 279, 166 Cal. Rptr. at 846; see notes 13-15 *supra* and accompanying text.

34. See notes 17-18 *supra* and accompanying text.

35. 27 Cal. 3d at 797, 614 P.2d at 279, 166 Cal. Rptr. at 847.

36. *Id.*

37. See notes 23-24 *supra* and accompanying text.

38. 27 Cal. 3d at 797-98, 614 P.2d at 279, 166 Cal. Rptr. at 847.

39. See notes 21-22 *supra* and accompanying text.

40. 27 Cal. 3d at 798, 614 P.2d at 279, 166 Cal. Rptr. at 847.

41. See notes 19-20 *supra* and accompanying text.

42. 27 Cal. 3d at 798, 614 P.2d at 279, 166 Cal. Rptr. at 847.

petitioner seeks to compel the performance of the public duty, the traditional mandate requirements of plaintiff's rights and the defendant's corresponding duty have been relaxed.⁴³ Justice Richardson cited *Board of Social Welfare* as standing for the proposition that "when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same."⁴⁴ For the minority, the significance of *Hollman* was in that court's characterization of the petitioner as a resident and taxpayer and her interest in that capacity was held sufficient to warrant standing.⁴⁵ Similarly, the majority in *Fuller* "acknowledged that an exception to the general rule requiring the existence of a substantial right" was recognized in the context of a public duty.⁴⁶ Finally, referring to *American Friends Service Committee*, Justice Richardson noted that the appellate court had specifically addressed the issue of standing and concluded that it was conferred where the mandate is one seeking to compel a governmental entity to comply with the law.⁴⁷

The *Carsten* majority cited two premises for denying petitioner standing before examining the policy reasons militating against finding her beneficially interested. The first reason cited for its conclusion was that the petitioner had no personal stake in the outcome of the suit because she was not seeking a license nor was she in danger of losing one. The court felt that any opinion rendered would be merely advisory.⁴⁸ While the majority alleged that a decision would have no effect on the petitioner, but would only serve to offer advice on future examinations, it denied that *Carsten* was seeking "an affirmative mandate . . . directing PEC to comply with its statutory obligations."⁴⁹

The second reason given for denying the petitioner standing was that she was suing herself. The majority contended that since she was the moving party and a duly appointed member of PEC, she was both plaintiff and defendant. Thus, she was said to be indulging in "narcissistic litigation" in which she could not lose.⁵⁰ However, the dissent pointed out the petitioner was suing the agency as a legal entity, not the members individually. Further, the committee is a mere creature of statute and the peti-

43. *Id.* at 802-05, 614 P.2d at 281-83, 166 Cal. Rptr. at 850-51.

44. *Id.* at 803, 614 P.2d at 282, 166 Cal. Rptr. at 850.

45. *Id.*

46. *Id.* at 803-04, 614 P.2d at 282, 166 Cal. Rptr. at 850.

47. *Id.*

48. *Id.* at 798, 614 P.2d at 279, 166 Cal. Rptr. at 847.

49. *Id.* at 805, 614 P.2d at 283, 166 Cal. Rptr. at 851.

50. *Id.* at 798, 614 P.2d at 279, 166 Cal. Rptr. at 847.

tioner is but a "constituent element of the Board of Medical Examiners of the Department of Consumer Affairs."⁵¹ Finally, the petitioner was only appointed to serve a four-year term.

The court's primary reason for denying petitioner standing to sue rested on policy considerations. The court found that the petitioner had to forfeit either her status as a member of the committee or her citizen's right to sue that same committee. As justification for this proposition in the context of an admittedly novel situation,⁵² the majority stated that "[T]he law is replete with examples of forfeiture of some rights available to others by virtue of acceptance of public service."⁵³

Certain language in the *Carsten* opinion indicates that what the majority feared was the creation of a class of new persons entitled to petition for writs of mandamus, the disruption and ultimate destruction of the administrative process, and the resulting administrative burden that would result in the judicial system.⁵⁴ These

51. *Id.* at 805, 614 P.2d at 283, 166 Cal. Rptr. at 851.

52. The court states explicitly at the outset that the case is one of first impression and that it has not found any authority on point in any jurisdiction. *Id.* at 795, 614 P.2d at 277, 166 Cal. Rptr. at 845.

53. *Id.* at 799, 614 P.2d at 280, 166 Cal. Rptr. at 848. The court cites *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), as the "classic" example of the forfeiture of some constitutional rights inherent in some public service offices. In that case, a police officer sought to be reinstated after being discharged for exercise of the constitutional right of free speech. The court, per Justice Holmes, found that while the plaintiff had a constitutional right to talk politics, he did not have the same right to be a police officer. It further held that the implied terms of the employment contract required suspension of certain constitutional rights. The majority in *Carsten* asserted that a similar rule is recognized in California by virtue of *Christal v. Police Comm'n*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939). That principle is expressed by the statement that:

There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment.

Id. at 569, 92 P.2d at 419. While the fact that these two cases deal with police officers is in itself, sufficient to distinguish their rules, another reason exposes the inadequacy of this contention. This is the only authority cited that found the exercise of a citizen-taxpayer's right to sue a governmental agency to enforce the law inconsistent with an agency board member doing the same. Even the appellate court hearing *Carsten* did not find the two roles incompatible or the necessity of petitioner's choosing one or the other status. The court seeks to use rulings which involve public offices of a wholly different nature *i.e.*, police officers, rather than the office held by petitioner, *i.e.*, board member, as a grounds for finding the role of citizen to be incompatible.

54. The court states that as to the judicial burden and the potential new class of litigants:

policy considerations appear to be the prime and, indeed, only justification for the court's conclusion.⁵⁵

By characterizing the petitioner as a board member first and a citizen-taxpayer second, the court asserted that permitting such suits would allow discontented minority board members to turn to the courts for a second chance at persuasion. The majority seemed to think that permitting persons in the petitioner's position to bring suit against an administrative agency on which he or she serves would also result in "the entire administrative process being transported wholesale to the courts."⁵⁶

The fear of disintegration and ultimate destruction of the administrative process that the majority asserted would result by recognition of such suits stems from the disruptive influence that the threat of litigation involves.⁵⁷ In this respect, the majority contended that allowing resort to judicial process undermines the primary purpose of the administrative process, which is to provide "expeditious disposition of problems in a specialized field without recourse to the judiciary."⁵⁸ Further disruptive influence is evidenced by the effect on the working relationship of board members subject to suit by fellow members. If a suit did ensue, members would be compelled to testify against each other, attack each other's position on issues, and to divulge internal delibera-

We believe, however, that the *California judiciary is ill-equipped to add to its already heavy burden* the duty of serving as an ombudsman for the plethora of state administrative agencies and local agencies that exist in every one of our 58 counties. Yet that role will inevitably be imposed if *minority board members may bring their defeats and frustrations to courts for a second chance at persuasion.*

27 Cal. 3d at 801, 614 P.2d at 281, 166 Cal. Rptr. at 849 (emphasis added). As for the effect of recognizing claims such as the petitioner's on the administrative process, the supreme court states, "[a]nd if that were permitted, the utility of administrative boards — unless they always achieve unanimity — would face an untimely demise." *Id.* It seems that the majority on the supreme court seized on the board's arguments presented to, and rejected by, the appellate court. 97 Cal. App. 3d at 114-15, 158 Cal. Rptr. at 556-57. The appellate court considered defendant's arguments that a new class of litigants would be created, that the influence on the administrative process would be disruptive and that the judicial burden would be too heavy but rejected these. *Id.*

55. See 27 Cal. 3d at 805, 614 P.2d at 283-84, 166 Cal. Rptr. at 851 (Richardson, J., dissenting): "The majority must rely on policy considerations alone. Why should courts strip 'citizen-taxpayer' status from an entire section of the public composed of persons who also happen to be public members of a government agency? The majority's reasons are insufficient."

56. *Id.* The dissent found that the majority exaggerated the burdens that would be thrust upon the judicial system if such lawsuits were recognized. "The majority, fearing an explosion of lawsuits, conjures a litigation disaster that would engulf us were petitioner's rights as a citizen honored. It is overreaction to anticipate that the entire administrative process will thus be transported, wholesale, to the courts. *Id.*"

57. *Id.* at 799, 614 P.2d at 279, 166 Cal. Rptr. at 847.

58. *Id.*

tions. Additionally, defending such suits would exhaust the limited monetary resources of such boards.⁵⁹

The majority sought to reverse a trend it noted in administrative law which involves increased judicial intervention in the administrative process. Allowing the petitioner standing would not comport with this aim. In a similar vein of reasoning, the court sought to avoid the role of an ombudsman.⁶⁰ By allowing "minority board members . . . [to] . . . bring their defeats and frustrations to courts for a second chance at persuasion,"⁶¹ the majority alleged that the judiciary would be undertaking a heavy burden for which it is not equipped.⁶²

IV. CASE IMPACT

The majority's decision leaves a clear legislative mandate unenforced. If the legislature had desired to allow PEC any discretion in its testing procedures for determining minimum competency levels, it would not have enacted section 2942 of the California Business and Professions Code.⁶³ By not granting the petitioner standing, the enforcement of the committee's statutory obligation must await suit by a citizen-taxpayer or a beneficially interested party who is seeking a psychology license or in danger of losing one. Enforcement seems unlikely. Allowing a member of the general citizenry to bring suit, but not one situated in the petitioner's position, appears inconsistent. By devoting her energies to the service of such an administrative committee, the petitioner was denied her right as a citizen to bring suit to enforce a public duty. Certainly the qualification of only competent psychologists in California is a matter of public interest and right.

In contrast, the court of appeal in *Carsten* found that "the duty of the agency is sharp and the public need weighty,"⁶⁴ as did the three dissenting justices of the California Supreme Court.⁶⁵ In

59. *Id.*

60. *Id.* at 801, 614 P.2d at 281, 166 Cal. Rptr. at 849.

61. *Id.*

62. *Id.* But see 27 Cal. 3d at 805, 614 P.2d at 283, 166 Cal. Rptr. at 851-52, (Richardson, J., dissenting). The minority found that the majority had exaggerated the burdens that would be imposed by recognizing such suits. As a basis, it pointed to the fact that the taxpayer and citizen suits to enforce public rights and duties have long been recognized without any avalanche of litigation.

63. 97 Cal. App. 3d at 113, 158 Cal. Rptr. at 555.

64. *Id.* at 111, 158 Cal. Rptr. at 556.

65. 27 Cal. 3d at 803-07, 614 P.2d at 282-84, 166 Cal. Rptr. at 849-52.

this regard, the court of appeal aptly stated that "PEC, like any administrative agency, must follow the law. It has been delegated the authority to administer and enforce the psychology licensing law except as to those functions specifically vested in the Board of Medical Quality Assurance."⁶⁶ The end result is that the high court's decision allows PEC to evade the law.

While the majority's opinion cited the administrative burden that would be imposed on the judiciary if such suits were permitted, the dissenting justices found that those fears were exaggerated. In support of its view, the dissent pointed out that taxpayer suits have been allowed for years where governmental action is challenged. There has been no indication that this has resulted in an unmanageable burden, or that such suits have been instituted in bad faith. Courts are capable of sorting out the sham suits from the proper suits in this area, as they are in other areas of the law.⁶⁷

V. CONCLUSION

A majority of the California Supreme Court held that a member of an administrative board or agency cannot sue the agency or board upon which such a member sits as the two positions are inconsistent. The ruling arose in the context of a suit by a member of the Psychology Examining Committee of the Board of Medical Quality Assurance filed against the board to compel its compliance with the California Business and Professions Code section 2942. That section, guiding the conduct of examinations administered to applicants for licenses to practice psychology, required a passing score of seventy-five percent. Instead of adhering to the statutory mandate, the board utilized the national average passing score as a requirement to qualify for a license. This has the consequence of permitting some persons to be licensed who would otherwise be statutorily disqualified.

The court's holding appears to be primarily based on policy considerations regarding the division of authority between the judiciary and administrative agencies. The majority feared a large influx of future suits and fullscale importation of the administrative process into the court room if such suits were permitted to be brought. Rather than limit the situations in which such suits could proceed, such as clear breaches of codified law, the court concluded with a broad prohibition against any board or agency member bringing suit against his or her board. This was based on

66. 97 Cal. App. 3d at 116, 158 Cal. Rptr. at 557.

67. 27 Cal. 3d at 805-06, 614 P.2d at 283-84, 166 Cal. Rptr. at 851-52.

the fear that allowing such suits would spell the demise of the administrative process.

VI. LABOR LAW

A. CALIFORNIA WORKMEN'S COMPENSATION SYSTEM

1. *The Scope of the Exclusive Remedy Under California Labor Code §§ 3601 and 4553: Johns-Manville v. Contra Costa Superior Court*

Responding to the inadequacy of compensation available to employees intentionally injured by their employer, the California Supreme Court defines the scope of the workmen's compensation system so as to allow an action at law for aggravation of disease. The extent of this exception and its well defined logic is discussed.

I. INTRODUCTION

The California Supreme Court held¹ that although section 3601² of the California Labor Code may bar an action at law by an employee against his employer for initial injury, it will not bar an action for aggravation of disease where the employer fraudulently and intentionally conceals from the employee his diseased condition. The court's decision examines the applicability of prior decisions involving the employer acting in a "dual capacity."³ The *Johns-Manville* decision also makes it easier to show a distinction between the initial job-related disease and the later unconnected aggravation of that disease.

The court's interpretation of the legislative intent in enacting section 3601 of the California Labor Code, the practical application of section 3601, and the policy considerations surrounding the *Johns-Manville* decision will be examined.

1. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980). The majority opinion was authored by Justice Mosk in which Chief Justice Bird and Justices Tobriner, Newman, and Manuel concurred. Justice Clark filed a dissenting opinion in which Justice Richardson concurred.

2. CAL. LAB. CODE § 3601 (West Supp. 1980). The California Labor Code provides for exclusivity of remedy in workmen's compensation cases by stating as follows: "Where the conditions of compensation exist, the right to recover such compensation [is] . . . the exclusive remedy for injury or death of an employee against the employer or against any other employee . . . acting within the scope of his employment. . . ." See note 14 *infra* and accompanying text.

3. See notes 29 and 30 *infra* and accompanying text. The "dual capacity" concept concerns the employer inflicting a second injury to the employee while acting in a capacity outside that of an employer.

Reba Rudkin⁴ was employed by Johns-Manville Products Corporation,⁵ a processor of asbestos, for 29 years. As a result of exposure to asbestos dust, plaintiff developed severe respiratory diseases that resulted in his eventual death.⁶ Johns-Manville had known since 1924 that prolonged exposure to asbestos was dangerous to health. Disregarding this fact, the company concealed the knowledge from the plaintiff and even advised him that there was no danger in working with the dangerous material.⁷ Plaintiff was not provided with adequate protective devices, nor was the plant operated in compliance with state and federal regulations concerning dust control.⁸

In addition to these violations, doctors retained by Johns-Manville were unqualified and uninformed regarding the dangers of asbestos exposure.⁹ The doctors were not advised by the corporation of plaintiff's pulmonary disease, its development, nor that the disease was initially caused by exposure to asbestos. Johns-Manville further failed to file the statutorily required reports regarding plaintiff's injury, which would have revealed the disease and likely resulted in its treatment.¹⁰ These acts were found to have been done willfully and fraudulently by Johns-Manville with an intent to retain plaintiff in his line of work.¹¹ An analysis of the facts indicated the plaintiff was not aware of any risk and would not have continued work in such an environment had he been aware of the dangers.¹²

Plaintiff sought compensatory and punitive damages, alleging intentional and wilful misconduct by his employers. Johns-Manville answered, alleging the action to be barred by section 3601¹³ since an application for workmen's compensation had been

4. Reba Rudkin was the plaintiff in the original action and the real party in interest in the action for writ of mandate to the Superior Court of Contra Costa County.

5. Johns-Manville Products Corporation [hereinafter Johns-Manville] was the defendant in the original action and is engaged in the mining, milling, manufacturing, and packaging of asbestos in Pittsburg, California.

6. Although plaintiff Rudkin's death occurred prior to the suit in the California Supreme Court, the court noted that the issues were not moot since an action for personal injuries survives the death of the plaintiff. CAL. PROB. CODE § 573 (West Supp. 1980).

7. 27 Cal. 3d at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 470, 612 P.2d at 950-51, 165 Cal. Rptr. at 860-61.

12. *Id.*

13. Rudkin attempted to escape the exclusivity provision of § 3601 by alleging intentional infliction of injury. Johns-Manville countered claiming intentional injury was compensated by means of § 4553 of the California Labor Code and its provision for an increase of award. See note 16 *infra* and accompanying text. Rudkin then argued the meaning of "intentional injury" to be different from that of the

filed. The trial court denied Johns-Manville's motion for judgment on the pleadings. An action for writ of mandate was filed with the state supreme court seeking to vacate the trial court's order. The writ was denied.

II. HISTORICAL ANALYSIS

The court in *Johns-Manville* based its holding on an interpretation of section 3601¹⁴ of the California Labor Code which provides an *exclusive* remedy for an injury caused by an employer. Two exceptions are provided which allow an action for damages to be maintained when death or injury is caused by the "wilful and unprovoked physical act of aggression" of another employee or when death or injury is caused by the intoxicification of another employee.¹⁵ Apart from these two exceptions, section 3601 provides workmen's compensation as the sole remedy in the case of an on-the-job injury.

Section 4553¹⁶ of the Labor Code provides for employee recourse where an injury is caused by an employer's "serious and willful misconduct."¹⁷ Where intentional misconduct can be shown, a compensation award is to be increased by 50%, but not to exceed ten thousand dollars.¹⁸ As a result, any misconduct

"serious and willful misconduct" contemplated under § 4553. The court saw no merit to this distinction and held § 4553 to cover intentional infliction of injury. 27 Cal. 3d at 472-73, 612 P.2d at 952, 165 Cal. Rptr. at 862. Cf. *Mercer-Fraser Co. v. Industrial Accident Comm'n*, 40 Cal. 2d 102, 117, 251 P.2d 955, 966 (1953) (the *Mercer* decision showed "[w]illfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences."). The defendant attempted to use *Mercer* to show that there was not a real distinction between intentional and willful misconduct as the plaintiff had urged.

14. See note 2 *supra* and accompanying text.

15. Essentially the two exceptions provide for an action at law when another employee inflicts injury outside the scope of his employment. Mr. Justice Clark argues in his dissent that these are the only two exceptions intended by the legislature since they were specifically enumerated, therefore, no other judge-made exception should be created. 27 Cal. 3d at 483, 612 P.2d at 959, 165 Cal. Rptr. at 869.

16. CAL. LAB. CODE § 4553 (West Supp. 1980). Section 4553 provides: "[t]he amount of compensation otherwise recoverable shall be increased by one-half where the employee is injured by reason of the serious and wilful misconduct of [the employer]. But such increase shall in no event exceed ten thousand dollars. . . ."

17. *Id.* The court equated the concept of serious and willful misconduct with intent. See note 13 *supra*.

18. Prior to 1917, an injured employee would have a choice of remedy where injuries were caused by an employer's gross negligence of willful misconduct. He could either claim workmen's compensation or maintain an action at law for damages. 1913 Cal. Stats. ch. 176, § 12b. In 1917 however, the provision was deleted and

that demonstratively causes the initial injury is exclusively compensated by an increase in the compensation award.¹⁹

The workmen's compensation system contemplates an on-the-job or closely-related job injury. The system was enacted to establish a balancing effect. The "advantage to the employer of immunity from liability at law [is balanced] against the detriment [of] relatively swift and certain compensation payments."²⁰ While the injured employee can be assured of quick and certain compensation, his right to a potentially larger recovery in an action at law for negligence or intentional misconduct of his employer is lost.²¹

To escape the restraints of the workmen's compensation system and maintain an action at law, an injured employee must demonstrate an injury outside the employment environment or one occurring outside of the scope and course of his employment.²² A mere showing of intent to injure will *not* escape the exclusive

a new provision inserted which allowed an increase of the compensation award by one-half as the sole remedy. This provision was intended to be a substitute for the right to seek damages in an action at law. 1917 Cal. Stats., ch. 586, § 6b.

19. The increase of an award allowed by § 4553 is additional compensation and does not represent punitive damages. *State Dept. of Corrections v. Workmen's Compensation Appeals Bd.*, 5 Cal. 3d 885, 489 P.2d 818, 97 Cal. Rptr. 786 (1971). Any deterrent effect that might be provided by a punitive damage award for such socially reprehensible conduct as that displayed by *Johns-Manville* can only be accomplished in an action at law.

20. 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.

21. *Id.*

22. A physical assault by an employer outside the scope of employment could be one example. *Magliulo v. Superior Court*, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975) (waitress allowed recovery in action at law where she suffered injury due to intentional "push" by her employer-bartender). *See also Meyer v. Graphic Arts Int'l Union*, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) (employer is liable in a civil suit for intentional assault, battery, false imprisonment, and rape committed by employer's agent acting within the scope of his employment).

Although he would later withdraw his separate opinion, initially Justice Manuel believed the rationale of *Meyer* and *Magliulo* clashed with the decisions of *Azvedo v. Indus. Accident Comm'n*, 243 Cal. App. 2d 370, 52 Cal. Rptr. 283 (1968) and *Azvedo v. Obel*, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968). He stated that the *Johns-Manville* case was not the proper means to resolve such a dispute. Justice Manuel believed two different issues were involved in the cited cases and the instant case. The *Johns-Manville* case involved the question of an employer's tort liability for intentional post-injury conduct resulting in the aggravation of the injury originally compensable only under workmen's compensation. The cases cited concern the exclusivity of remedy under section 3601 for an initial injury as a result of an intentional assault by the employer which is "fairly traceable" to a risk of the employment. Justice Manuel did not wish the court to obscure the distinction between the intentional aggravation of a job related injury and the intentional infliction of the original injury itself. 27 Cal. 3d at 479, 612 P.2d at 956-57, 165 Cal. Rptr. at 866-67 (Manuel, J., concurring and dissenting) (opinion withdrawn).

The court modified their opinion to expressly indicate that the *Johns-Manville* decision did not resolve any conflict as to an employee's right to maintain an action at law against his employer for a physical assault related to employment. In view of the court's modification, Justice Manuel chose to withdraw his opinion and

remedy found in sections 3601 and 4553.²³

Actions have not been successful where employees intentionally were not informed of the dangers of handling material which would result in injury if handled improperly.²⁴ The same result occurred when false representations were made as to the safety of certain materials.²⁵ In addition, no action at law was allowed where an employee was permitted to use dangerous equipment without proper instruction.²⁶

To allow an action at law in these cases would undermine the workmen's compensation system.²⁷ Inquiries would not focus on whether the injury occurred within the course of the employee's employment, but instead would center on the state of mind of the employer or representative prior to the accident.²⁸

If an injured employee can show his injury resulted from the employer's misconduct while acting within a "dual capacity," recovery in an action at law may be possible. The dual capacity doctrine was enunciated in *Duprey v. Shane*.²⁹ The *Duprey* court held that although workmen's compensation benefits were recoverable, the plaintiff could also maintain an action against the defendant employer who caused the aggravation of injuries. The defendant had entered into two relationships with the plaintiff, one as an employer and one as a physician.³⁰ The *Duprey* court

join the majority. 28 Cal. 3d 194a, 194b (1980) (Manuel, J., withdrawing concurring and dissenting opinion).

23. A mere showing of intent to injure will be insufficient. It must be demonstrated that the employer intended to inflict an injury that an employee would not contemplate being within the risks of the employment. See note 7 *supra*.

24. *Wright v. FMC Corp.*, 81 Cal. App. 3d 777, 146 Cal. Rptr. 740 (1978) (concealment of inherent dangers in chemicals used in preparation of pesticides for the deliberate purpose of inducing plaintiff to accept employment is insufficient to maintain an action at law).

25. *Buttner v. American Bell Tel. Co.*, 41 Cal. App. 2d 581, 107 P.2d 439 (1940) (intentional misrepresentation of the dangers of carbon tetrachloride resulting in the plaintiff's injuries insufficient to maintain an action at law).

26. *Law v. Dartt*, 109 Cal. App. 2d 508, 240 P.2d 1013 (1952) (no action at law may be maintained where injury to employer results from inadequate training and supervision).

27. 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.

28. The California Supreme Court noted this in denying a showing of intent as sufficient grounds to maintain an action at law. *Id.*

29. 39 Cal. 2d 781, 249 P.2d 8 (1952). In *Duprey*, a nurse employed by a medical partnership was injured in the course of her duties. She was treated by doctors within the partnership and suffered enhancement of her injuries.

30. Essentially the "dual capacity" doctrine examines the liability of an employer when he acts toward his employee in a capacity outside the employee-employer relationship. The decisive test of dual capacity is whether the

could see no reason to immunize a doctor from suit merely because his patient happened to be his employee and had also contracted her injury while working for him. As a result of *Duprey*, if an injury can be shown to have been inflicted or aggravated by an employer acting in a capacity other than that as an employer, an action at law may be maintained.³¹

In *Johns-Manville*, the California Supreme Court was concerned with additional compensation to those intentionally injured by the employer without undermining the workmen's compensation system. In order to do so, the court would seek to bifurcate plaintiff's injury into its original occurrence and its aggravation due to intentional concealment.³²

III. CASE ANALYSIS

The California Supreme Court was interested in establishing a distinction between a cause of disease due to the hazards of the occupation and an injury resulting from aggravation of that disease. Perceptively, the court noted a trend toward allowing an action at law for injuries suffered during employment if the employer acts intentionally to injure the employee such that the employer's deliberate misconduct results in an aggravation of the initial work related injury.

The supreme court relied on the court of appeal decision of *Ramey v. General Petroleum Company*³³ as an example of this trend. In *Ramey* an action for fraud was allowed against an employer who made misrepresentations concerning an employee's right to medical care. The employer had conspired with another individual to conceal the fact that the employee's injuries were

nonemployer-type activity creates a differing set of duties owed the employee by the employer. Thus, in the *Duprey* case, a doctor-patient relationship arose when the employer undertook to treat the injured employee to the exclusion of other physicians. 2A LARSON, WORKMEN'S COMPENSATION LAW, § 72.80 (1976); see Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L. J. 1117.

31. This discussion of the change in obligation as a test for dual capacity was most recently shown in *D'Angona v. County of Los Angeles*, 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980). In *D'Angona* a nurse employed by defendant's hospital contracted an infection known as meningococemia in the course of her employment. Defendants undertook to treat plaintiff but due to their negligence she developed gangrene in the extremities resulting in the amputation of all plaintiff's toes and fingers except for one. In the ensuing suit, the defendant contended plaintiff's sole remedy was workmen's compensation. The court held that defendant's negligence occurred in a role other than that of an employer such that the workmen's compensation system was not applicable and a suit at law could be maintained.

32. As will be shown, workmen's compensation is the exclusive remedy for the first injury, but an action at law may be maintained for harm suffered by the second injury. See notes 53-56 *infra* and accompanying text.

33. 173 Cal. App. 2d 386, 343 P.2d 787 (1959).

caused by a third employee against whom he had recourse. The court of appeal held this misconduct was sufficiently outside the work relationship such that an action at law could be maintained. The supreme court felt General Petroleum's concealment to be similar to the concealment of Johns-Manville.³⁴

The court also examined an extension of the "dual capacity" doctrine in *Unruh v. Truck Insurance Exchange*.³⁵ In *Unruh*, it was held an action at law may be maintained against the employer for assault and battery and intentional infliction of emotional distress as a result of the employer's deceitful conduct in investigating a compensation claim.³⁶ Although the *Unruh* decision dealt with a suit against an insurer as the alter-ego of the employer and *Johns-Manville* dealt with a suit directly against the employer, the court believed the *Unruh* decision and rationale were applicable to the present case.³⁷

34. Although related to the first injury, the further injury was suffered due to the employer's acts outside the general risks of employment.

35. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

36. The suit was brought against the employer's insurer who, while acting within the compensation system, stood in the position of the employer and was immune from suit. CAL. LAB. CODE § 3850 (West Supp. 1971). However, when the insurer stepped outside its role by committing an intentional tort, it became a separate party and was no longer cloaked with the employer's immunity.

In *Unruh*, an investigator of the insurer, misrepresented his position and intentions, and befriended the injured employee. He then enticed her to visit Disneyland where he violently shook a rope bridge causing her further injury. His actions were designed to expose the alleged falsehood of her injury, but instead her injury was aggravated. When films covertly made of this incident demonstrating the employee's conduct were shown at a compensation hearing, the employee suffered a nervous breakdown. The court held the insurer had acted fraudulently in obtaining evidence in a capacity other than that as an insurer. Therefore, workmen's compensation law would not cloak them with immunity from a suit at law. 7 Cal. 3d 16, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

The *Unruh* holding that an insurer may be sued as a person other than the employer was based upon an analogy to *Duprey's* "dual capacity" doctrine. Like *Duprey*, which concerned doctors who acted as both physicians and employers, the insurer in *Unruh* was vested with that same dual personality by committing the intentional tort such that an independent cause of action was created. See also *Dorado v. Knudsen Corp.*, 103 Cal. App. 3d 605, 163 Cal. Rptr. 477 (1980) (employee of a limited partnership may sue the general partner for injuries sustained due to negligence where the partnership could essentially do business with itself); *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977) (followed the dual capacity doctrine of *Duprey v. Shane*); *Hoffman v. Rogers*, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972) (negligence of company physician in treating industrial injury is not immunized from suit by workmen's compensation).

37. The dissent decided this distinction was fatal since Johns-Manville acted at all times as the employer in providing physical examination and x-rays for employees. This view may fail to consider the risks truly contemplated by an em-

The court explored the original philosophy of the workmen's compensation system³⁸ and the benefits of an employee giving up an award at law, against the certain and swift compensation under the statutory scheme. The court noted that in *Magliulo v. Supreme Court*,³⁹ an employee was willing to surrender his right to maintain an action at law for injuries sustained in the ordinary pursuit of his duties. However, the court concluded that an employee would not likely be willing to forego a remedy at law for any and all injuries the employer might inflict upon him.⁴⁰

The *Johns-Manville* court then observed that while it is possible that the plaintiff could have anticipated injury due to the concealed hazards of the job, it is inconceivable that he contemplated that his employer would intentionally conceal the knowledge that he was seriously ill as a result of the hazardous work environment.⁴¹ The intentional concealment⁴² was sufficiently separate from the initial contraction of the disease such that Johns-Manville could *not* reasonably expect to be immunized from suit because of the initial workmen's compensation award. Further, the plaintiff could not be expected to surrender his right to recovery for any and all physical harms incurred at the hands of his employer outside the scope and course of his employment.⁴³

ployee when he undertakes employment. See notes 40, 43 and 45 *infra* and accompanying text.

38. See note 20 and 21 *supra* and accompanying text.

39. 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975). See note 22 *supra*.

40. Essentially the court sought to balance the benefits of the workmen's compensation system with any interference with an injured employee's other legal rights. It was inconceivable to the court that sufficient benefit would be derived by extending the exclusivity of the remedy provision to intentional aggravation of disease to justify denying an injured employee's right to bring suit. 27 Cal. 3d at 477-78, 612 P.2d at 955-56, 165 Cal. Rptr. at 865-66.

41. Workmen's compensation was viewed by the court as a vehicle for compensating those injured due to the inherent risks of the job, not to create new risks by encouraging employers to further injure employees believing their liability to be limited by workmen's compensation. *Id.*

42. Negligent aggravation of disease may not be made a basis of an action at law for recovery against an employer or its insurer. *Deauville v. Hall*, 188 Cal. App. 2d 535, 10 Cal. Rptr. 511 (1961) (negligence of employer's agent in referring employee to incompetent physician who was unqualified to treat industrial injury was not actionable at law); *Noe v. Travelers Ins. Co.*, 172 Cal. App. 2d 731, 342 P.2d 976 (1959) (negligence of defendant insurance company in delaying approval of plaintiff's operation to remedy industrial injury is subject to the exclusivity of a workmen's compensation remedy).

43. See *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978). The *Renteria* decision provided a further exception to the sole remedy of workmen's compensation.

Renteria allowed an action at law when the injury to plaintiff is nonphysical as a result of intentional infliction of emotional distress. The court reasoned this remedy was appropriate since the labor code did not provide an alternative remedy for nonphysical injuries.

The court did not believe its decision would undermine the effectiveness of the workmen's compensation system⁴⁴ since it restricted its holding to cases of aggravation of disease in an employment relationship where the existence of injury is intentionally withheld.

The majority also had little trouble rectifying the construction of sections 3601 and 4553 and the literal reading given them by the dissent. The majority did not "believe that the Legislature in enacting the workmen's compensation law intended to insulate such flagrant conduct from tort liability."⁴⁵ The normal work related injury had been contemplated, but not the intentionally inflicted injuries outside the scope of the employee's duties. Therefore, the exclusivity provision of section 3601 will not preclude an action at law where intent to aggravate known injuries can be demonstrated.

IV. CASE IMPACT

The majority opinion should be applied narrowly. The court apparently wanted to confine their decision to situations where the employer knows of the employee's existing disease, and intentionally fails to warn the employee, which eventually results in an aggravation of that disease.⁴⁶ Indicating such an intent, the court dismisses the possible multiplicity of lawsuits by noting that the restriction of "plaintiff's damages to aggravation of the disease

44. Previously, courts have strictly construed § 3601 to prevent the breakdown of the workmen's compensation system. *See, e.g.,* *Eckis v. Sea World Corp.*, 64 Cal. App. 3d 1, 134 Cal. Rptr. 183 (1976) (secretary injured while attempting to ride defendant-employer's killer whale at defendant's request is subject to workmen's compensation as her sole remedy even though the activity was outside her normal line of duties); *Saala v. McFarland*, 63 Cal. 2d 124, 403 P.2d 400, 45 Cal. Rptr. 144 (1965) (workmen's compensation remedy will not be extended to co-employees involved in an accident in the employer's parking lot since the accident occurred "after work"). The court believed that the feared plethora of actions which may cause the downfall of the entire workmen's compensation system would be averted if actions were restricted to those for fraud in aggravating a present injury.

45. 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. This demonstrates the majority's concern over the true purpose of workmen's compensation and that the court is not interested in rendering a harsh decision to preserve the ease of practical application of the system.

46. This situation is most likely to arise in a setting such as *Johns-Manville*, where the employer not only assures the employee of a safe environment in which to work, but also advises him that his health is normal after the employer has administered an examination. In this manner the employee is fraudulently convinced that he need not seek further medical aid.

caused by the alleged fraud of the defendant would substantially limit the number of such actions."⁴⁷ The decision also notes that the exclusivity of the remedy under workmen's compensation for on the job injury "would not be seriously undermined by holding defendant liable for the aggravation of *this* plaintiff's injuries. . . ."⁴⁸ This clearly indicates the decision may be limited to factual settings substantially similar to those of the *Johns-Manville* variety.

Johns-Manville does not appear to be a real expansion or modification of the "dual capacity" doctrine formulated in *Duprey v. Shane*.⁴⁹ At a minimum, its expansion does not exceed the boundaries established in the *Unruh* decision.⁵⁰ In contrasting the *Unruh* rationale, the court is not establishing that the defendant employer has become a different person by engaging in intentionally harmful conduct, but that California labor law will not act as a limiting shield when the employer intentionally inflicts a nonwork-related injury upon one of its employees. This is especially noted in the later case of *D'Angona v. County of Los Angeles*,⁵¹ where the court discussed the "dual capacity" doctrine of *Duprey*. *D'Angona* noted that workmen's compensation was the exclusive remedy for initial injury or its *negligent* aggravation due to inept medical treatment. An exception to this rule is allowed if it can be established that the employer undertook a different relationship with the employee by attempting treatment. A clear dual role with dual obligation was still required.⁵²

If a distinct, separate role need not be shown under *Johns-Manville*, just what must be shown in order to sustain an action at law is a relevant question. First, it would seem that an initial

47. 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

48. *Id.* (emphasis added).

49. 39 Cal. 2d 781, 249 P.2d 8 (1952). See notes 29 and 30 *supra* and accompanying text.

50. It could be argued that *Johns-Manville* "stepped out of its role" as an employer by acting improperly such that a suit could be maintained under the dual capacity doctrine. However, the decision does not indicate that a *new* duty is owed to the injured employee when the employer knows of his malady and nondisclosure would result in further injury. Mere nondisclosure would be insufficient; it must be done deliberately with an intent to further harm the injured employee. 27 Cal. 3d at 477-78, 612 P.2d at 955-56, 165 Cal. Rptr. at 865-66.

51. 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980). See note 31 *supra*.

52. The *D'Angona* opinion was also authored by Justice Mosk. Justice Mosk did not indicate any substantial change in the dual capacity doctrine nor any further encroachment upon the exclusivity of remedy as provided by § 3601. The *Johns-Manville* decision was not even mentioned in *D'Angona*, further indicating Justice Mosk's desire to separate the court's holding in *Johns-Manville* and the dual capacity of *Duprey*. All members of the court concurred in *D'Angona*, including Justice Clark, which indicated their approval of the status quo of "dual capacity."

job related injury must be established in conjunction with a separate but corresponding second injury resulting from the employer's intentional conduct.⁵³ Thus, it would be necessary to establish that the second injury was not proximately caused by the work environment, but by the wrongful and intentional conduct of the employer.

Next it must be shown that the employer had an opportunity to warn or mitigate the employee's injury and intentionally failed to do so.⁵⁴ Scierter is satisfied by a showing that the employer knew the employee was diseased, knew the disease was work related, and knew that through concealment the disease would be aggravated.⁵⁵

Once those factors are established, exclusivity of remedy under workmen's compensation is no longer a bar since the injury for which the employee seeks to recover is no longer directly job related, as contemplated by the law, but is essentially outside the scope and course of his employment.⁵⁶ In this way punitive damages may be recovered which serves the policy of deterring the intentional and wrongful conduct of employers.⁵⁷ Moreover, the workmen's compensation policy of quickly compensating injured workers for injuries due to contemplated hazards will not override the general desire to protect unsuspecting workers from unscrupulous employers.⁵⁸

53. This is the idea of demonstrating the secondary nonemployment-related injury. See notes 32 and 41 *supra* and accompanying text.

54. A mere negligent failure to warn will be insufficient. See note 42 *supra* and accompanying text.

55. Therefore, the intentional infliction of injury does not relate to an employment-related injury, which would be compensated by § 4553 of the Labor Code, but relates to the secondary or nonemployment injury thereby allowing tort liability. 27 Cal. 3d at 469-70, 478, 612 P.2d at 950-51, 956, 165 Cal. Rptr. at 860-61, 866.

56. The majority opinion allowed for a set-off to prevent double recovery. Therefore, any amount received by the plaintiff for aggravation of disease in the workmen's compensation action will be set-off against any recovery received in an action at law. *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. See *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

57. As previously discussed, additional recovery under § 4553 is not termed punitive. See note 19 *supra*.

58. Justice Clark in his dissent felt the effective result of the *Johns-Manville* decision would be to encourage employers to curtail special medical programs toward their employees in order to escape tort liability. This conclusion may assume that the requisite elements of the majority decision are easily demonstrated and, therefore, it appears unfounded.

V. CONCLUSION

The court in *Johns-Manville* recognizes that section 3601 and 4553 of the California Labor Code may inadequately compensate injured workers in certain cases of intentional misconduct by their employers. Although employees may be willing to give up their right to sue in order to gain the expeditious remedies of the workmen's compensation system, it is unlikely that they wish to immunize their employer from whatever sort of harm the employer may intentionally inflict upon them. Therefore, the court allows suits at law to be maintained where intentional aggravation of disease may be demonstrated. By restricting the decision to the factual circumstances similar to those of this case and by limiting recovery to the *aggravation* of disease due to an employer's concealment, the court does not undermine the effectiveness and purpose of the workmen's compensation system. The court summed up its decision by saying, "the legislature never intended that an employer's fraud was a risk of employment."⁵⁹

B. HIRING STANDARDS

1. *Private Hospital Held To Public Hospital Standards:* *Miller v. Eisenhower Medical Center*

In *Miller v. Eisenhower Medical Center*,¹ the California Supreme Court expressly held that a private hospital cannot refuse staff membership under a standard susceptible to arbitrary application.² Under the standard used by Eisenhower Medical Center, Doctor Miller was denied staff membership upon a determination by the medical executive committee that sufficient doubt existed concerning Doctor Miller's ability to work with others.³ The court had previously held in the case of public hospitals that the standard for staff membership could not be so vague

59. 27 Cal. 3d at 476, 612 P.2d at 954, 165 Cal. Rptr. at 864.

1. 27 Cal. 3d 614, 614 P.2d 258, 166 Cal. Rptr. 826 (1980). Donald Miller, a licensed physician appealed from an order of the superior court which denied his petition for a writ of mandate whereby he sought to compel a private, nonprofit hospital corporation to grant him staff membership and hospital privileges.

2. See, e.g., *Willis v. Santa Ana, etc., Hosp. Ass'n*, 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962); *Blank v. Palo Alto-Stanford Hosp. Center*, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965).

3. Article III, Section 2 of the Medical Staff Bylaws provides in relevant part that "[o]nly physicians and dentists licensed to practice in the State of California, who can document their background, experience, training and demonstrated competence, their adherence to the ethics of their profession, their good reputation, and their ability to work with others, with sufficient adequacy to assure the Medical Staff and the Board of Trustees that any patient treated by them in the hospi-

and uncertain so as to provide a substantial danger of arbitrary, capricious or discriminatory application.⁴ The court recognized that a bylaw which focuses on an applicant's ability to work with others in a manner which is designed to insure high quality patient care is not on its face, improper.⁵ However, it further reasoned that in order to prevent arbitrary application of an otherwise acceptable standard, the medical center must show that the applicant's apparent inability to work with others presents a substantial danger to the quality of patient care to be provided.⁶ In arriving at this decision, the court rejected the Medical Center's argument that such an adverse effect could be presumed.⁷

The court's holding is significant for two reasons. First, it is important in that a private hospital is being held to a standard of employment previously found only in the public sector.⁸ Secondly, it further protects the rights of prospective employees of private hospitals from standards susceptible to arbitrary application.⁹

tal will be given a high quality of medical care, shall be qualified for membership on the medical staff" (emphasis added).

4. See generally, *Rosner v. Eden Township Hosp. Dist.*, 58 Cal. 2d 592, 375 P.2d 431, 25 Cal. Rptr. 551, (1962). (a bylaw that spoke in terms of "apparent ability to get along with others" was improper); *Martino v. Concord Community Hosp. Dist.*, 233 Cal. App. 2d 51, 43 Cal. Rptr. 255, (1965); *Wyatt v. Tahoe Forest Hosp. Dist.*, 174 Cal. App. 2d 709, 345 P.2d 931 (1959).

5. The bylaw provision . . . must be read to preclude the rejection of an otherwise qualified physician from medical staff membership unless it can be shown that he manifests an inability to 'work with others' in the hospital setting which, by reason of its particular character, presents a real and substantial danger that patients treated by him might receive other than a 'high quality of medical care' if he were admitted to membership. 27 Cal. 3d at 631, 614 P.2d at 269, 166 Cal. Rptr. at 837.

6. The court noted that although a doctor may be shown to manifest personality characteristics which other members of the staff may find disagreeable this is not enough to justify rejection under the bylaw provision. "To permit such application of the bylaw . . . would . . . pose a substantial danger of application 'as a subterfuge where considerations having no relevance to fitness are present.'" *Id.* at 632, 614 P.2d at 269, 166 Cal. Rptr. at 839.

7. "[W]e must insist that a hospital seeking to withhold staff membership . . . on the ground we here consider must be prepared to come forward with evidence" *Id.* at 632-33, 614 P.2d at 839, 166 Cal. Rptr. at 839.

8. See, e.g., *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974) (Leon J. Pinsker claimed that various orthodontists' societies denied his application for membership without giving him an opportunity to present his position on a contention that he violated a society rule).

9. Note that in *Rosner v. Eden Township Hosp. Dist.*, 58 Cal. 2d 592, 375 P.2d 431, 25 Cal. Rptr. 551 (1962), the California Supreme Court reversed a superior court denial of a writ of mandamus to compel the admission of a physician to

VII. JUVENILE

A. PRIVILEGES

1. *Attorney-Client: De Los Santos v. Superior Court of Los Angeles*¹

The California Supreme Court held in the case of De Los Santos v. Superior Court of Los Angeles County that statements made by a minor plaintiff to his mother-guardian ad litem in the preparation of answers to interrogatories or responses to requests for information from opposing counsel came within the attorney-client privilege.

I. INTRODUCTION

A suit seeking damages for personal injuries arising out of a bicycle accident was filed by a minor, Jesse De Los Santos, through his mother, Mrs. De Los Santos, as guardian ad litem. Mrs. De Los Santos also joined in the suit to recover her costs for past and future medical care for Jesse. During trial preparation, the defendant submitted interrogatories to the minor through his attorney. Subsequently, statements were made to the mother by the nine-year-old plaintiff in response to the interrogations either for the purpose of answering the interrogatories or to assist in the preparation of the case for trial. The defendants sought to discover the entire contents of any conversations between Jesse and his mother while answering the initial interrogatories. Mrs. De Los Santos resisted discovery of these conversations on the ground that they sought to elicit information protected by the attorney-client privilege.² The defendants successfully sought a motion to compel answers to interrogatories regarding any statements made by Jesse to his mother, except those made solely in the attorney's presence. Jesse petitioned for a writ of mandate to prohibit discovery of the information sought and for a protective order, which was eventually granted by the Supreme Court of California.

The high court held that the information sought to be discovered was privileged under the statutory attorney-client privilege because it was analogous to a confidential communication³ be-

membership on the medical staff of a hospital contracted by a local hospital district. The *Miller* case expands the protections of *Rosner* to prospective employees of private hospitals.

1. 27 Cal. 3d 677, 613 P.2d 233, 166 Cal. Rptr. 172 (1980).

2. CAL. EVID. CODE § 950 (West 1966).

3. CAL. EVID. CODE § 952 (West Supp. 1980). The section reads: As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far

tween an attorney and his client.⁴ The minor had disclosed the information to the mother-guardian ad litem in her capacity as such. Mrs. De Los Santos, in her capacity as guardian ad litem to Jesse, was entitled to invoke the attorney-client privilege.⁵ She could assert it on Jesse's behalf by refusing to answer questions of the defendants seeking privileged information.

Further, the California Supreme Court found that statements made by a client to his attorney for the purpose of answering interrogatories or in preparation of litigation do not lose their confidential character simply because the answers to the interrogatories themselves will later be communicated by the attorney to others. It is only the answers to the interrogatories that are intended to be communicated, and often the lawyer must sort through the information received from the client to adequately answer interrogatories. To hold that such information loses its confidential character would completely destroy the privilege under circumstances which should entitle the attorney and his client protection, *i.e.*, preparing to litigate a claim.⁶

The court also held that the guardian ad litem of a minor, as an officer of the court, was not required to be entirely disinterested in the litigation.⁷ In light of the California Legislature's determination that a minor requires a guardian ad litem in any litigation⁸

as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

4. CAL. EVID. CODE § 951 (West 1966). The section states:

As used in this article, 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

5. CAL EVID. CODE § 954 (West Supp. 1980). This section defines the privilege as permitting "the client, whether or not a party, . . . to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) the holder of the privilege. . . ."; CAL. EVID. CODE § 953 (West 1966). This section defines "holder of the privilege" to mean "(a) The client when he has no guardian or conservator. (b) A guardian or conservator. . . ."

6. 27 Cal. 3d at 682-83, 613 P.2d 236, 166 Cal. Rptr. 175.

7. *Id.* at 685, 613 P.2d at 238, 166 Cal. Rptr. at 177.

8. *Id.* at 684, 613 P.2d at 237, 166 Cal. Rptr. at 176.

and the broad powers granted to such guardian,⁹ disclosure of information by the minor to the guardian is protected under the statute governing confidential communications between attorney and client. This is irrespective of the minor's age.¹⁰

Finally, the court determined that the statements rendered to an attorney by a client through an agent are privileged whether or not the agent actually relays such statements to the attorney. It is the client's intent in making the communication that controls whether it is confidential, and hence, privileged.¹¹ Here, Jesse's right to claim the privilege was not waived as to conversations between himself and his mother. The court held that the defendants had confused Jesse's answers to the initial interrogatories, which were discoverable, with conversations between Jesse and his mother upon which the answers were based; such conversations were not discoverable.¹²

9. CAL. CIV. PROC. CODE § 372 (West Supp. 1980). This section reads in relevant portion:

When a minor, . . . is a party, he must appear either by a guardian of the estate or by a guardian ad litem appointed by the court The guardian . . . so appearing for any minor, . . . in any action or proceedings shall have power, with the approval of the court in which such action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against his ward.

See Robinson v. Wilson, 44 Cal. App. 3d 92, 118 Cal. Rptr. 569 (1974) (the guardian ad litem of a minor has the right to make stipulations or concessions binding on the minor if not prejudicial to him); *Cf. Berry v. Chaplin*, 72 Cal. App. 2d 652, 169 P.2d 442 (1946) (a minor appearing by guardian ad litem is not bound by admissions of the representative which sacrifice the minor's property and any concessions by the guardian surrendering material rights of the minor, such as the right to a trial, will be set aside unless shown to be beneficial to the minor's rights). *See also State v. Superior Court of Sacramento County*, 86 Cal. App. 3d 475, 150 Cal. Rptr. 308 (1978) (minor's parents have preferential status in applying for appointment as guardian ad litem). *See Cloud v. Market Street Ry. Co.*, 74 Cal. App. 2d 92, 168 P.2d 191 (1946) (guardian ad litem has power to control the procedural steps incidental to conduction of the litigation).

10. 27 Cal. 3d at 684, 613 P.2d at 237, 166 Cal. Rptr. at 176. The California Supreme Court noted that the legislature does not differentiate the age of the minor.

11. *Id.* at 685, 613 P.2d at 238, 166 Cal. Rptr. at 177. The court stated that "defendants cite no authority for the proposition that in order to retain confidential status statements by a client to his lawyer through an agent or other authorized intermediary must be rendered literally by the intermediary to the lawyer. The privilege belongs to the client, and it is his intent to make a confidential communication to his lawyer that controls." *Id.*

12. *Id.* at 685-86, 613 P.2d at 238, 166 Cal. Rptr. at 177. The defendants argued that statements made to an attorney that are designated to be communicated to others by the attorney, in this instance referring to answers to the interrogatories sustained as privileged information, are not privileged for the very reason they are to be communicated to others. The court stated, "To hold that such an intent is commensurate with a waiver of the privilege would completely destroy the privilege whenever a client sought to litigate his case." *Id.* at 682-83, 613 P.2d at 236, 166 Cal. Rptr. at 175.

II. HISTORICAL ANALYSIS

The attorney-client privilege attaches where legal advice of any kind is sought from a professional legal advisor in his or her capacity as such. Communications relating to that purpose made in confidence by the client are, at the client's insistence, permanently protected from disclosure, unless the privilege is waived.¹³ While privileges in general tend to block introduction of relevant evidence, the law protects certain communications to promote what it considers to be a greater objective.

The principal policy behind the attorney-client privilege is to promote freedom of consultation between legal advisors and clients, which is essential to adequate legal representation.¹⁴ The privilege embraces any means of communication,¹⁵ from whatever origin,¹⁶ and whether or not transmitted to the attorney by the client himself, or by an agent of either the client or attorney,¹⁷ or if

13. *Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977). The attorney-client privilege applies where legal advice of any kind is sought from a professional legal advisor in his capacity as such. Communications made in confidence by a client are permanently protected from disclosure, unless the protection is waived. See *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951). This case is in accord with the above given definition as to when the privilege applies. The case also stands for the proposition that the attorney-client privilege covers all communications originating from or transmitted through agents. Often, the attorney-client privilege covers situations that other professional privileges fail to cover, such as the physician-patient privilege with its notorious patient-litigant exception that nearly swallows the privilege when litigation is involved.

14. *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977) (the major policy behind the attorney-client privilege is to promote freedom of consultation of legal advisors by clients); *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951) (the purpose of the attorney-client privilege is to encourage full and free disclosure of all relevant facts since this is essential to adequate legal representation).

15. *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 227, 231 P.2d 26, 30 (1951). While some other professional privileges only cover oral or written communications, the attorney-client privilege embraces actions, signs, or other means of communicating information between a client and his attorney.

16. *In Re Navarro*, 93 Cal. App. 3d 325, 155 Cal. Rptr. 522 (1979). Under the California Evidence Code's provisions regarding the attorney-client privilege, any information transmitted between a client and his attorney is a protected communication regardless of its origin. This case discharged a contempt order which had been issued against an attorney who had refused to disclose whether or not she had shown her client a certain police arrest report. The court upheld the attorney's claim that her refusal to disclose the report was within the privilege.

17. *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951). The court held that communications from a physician to an attorney, where the attorney had employed the physician as his and the client's agent for preparation for litigation, were covered by the attorney-client privilege.

the communications originate with the agent.¹⁸

The California Evidence Code, in defining the attorney-client privilege, states that where a minor or incompetent has a guardian, such guardian can invoke the privilege on behalf of the minor or incompetent.¹⁹ The code also protects confidential communications made by a client to an attorney through an agent where the third party is "reasonably necessary for the transmission of the information to the lawyer or for the accomplishment of the purpose for which the lawyer was consulted."²⁰ Thus, while the privilege is not waived simply because transmitted to the attorney through the client's agent,²¹ where there is no indication of agency, the privilege is not applicable.²² Similarly, the presence of third persons when a communication is made has often been held to destroy the privilege,²³ although such is not the case where a third person is present to further the interest of the client.²⁴ It is the client's intent that determines whether a communication is confidential but the surrounding circumstances can

18. *Id.*

19. *See* note 5 *supra*.

20. *See* note 3 *supra*.

21. *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 722, 388 P.2d 700, 36 Cal. Rptr. 468 (1964). While the attorney-client privilege is not waived simply because a communication is made through the client's or the attorney's agent, in this instance it was, as the information passed through four persons before reaching the attorney. *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951). Attorney-client privilege was not lost where a document was transmitted by a physician who was an agent of the client to the attorney who examined it in preparation of litigation. *Grosslight v. Superior Court of Los Angeles County*, 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 (1977). The attorney-client privilege protects information coming from a third party who is not a client only when that person is acting as the client's agent. *People v. Lee*, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970) (the attorney-client privilege does not protect information coming to an attorney from a third person who is not a client unless such person is acting as the client's agent).

22. *People v. Lee*, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970). Defendant, charged with attempted murder, sought to exclude testimony from representatives of the public defender's office that they received a pair of shoes allegedly used in the murder attempt which had been delivered by the defendant's wife. The court found no error in refusing to exclude such testimony on the basis of the attorney-client privilege, as there was no indication that the wife was acting as the defendant's agent or under his direction.

23. *Lindholm v. Galvin*, 95 Cal. App. 3d 443, 157 Cal. Rptr. 167 (1979). The attorney-client privilege applies only to confidential communications between lawyer and client, and where a third person is present, statements of the client to his attorney did not qualify as confidential communications privileged from disclosure.

24. *See* note 3 *supra*; *Cooke v. Superior Court of Los Angeles County*, 83 Cal. App. 3d 582, 147 Cal. Rptr. 915 (1978). The attorney-client privilege "extends to communications which are intended to be confidential, if they are made to attorneys, family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interests of the litigant." *Id.* *See also* Comment, *Attorney-Client Privilege in California*, 10 STAN. L. REV. 297 (1958).

rebut any purported intent of confidentiality where they indicate the communication was not made in confidence.²⁵

While *De Los Santos* appears to have been the first case to have reached the California Supreme Court concerning the issue of a minor's communication to his attorney through a parent or guardian ad litem, there has been at least one case before a lower court on point²⁶ and several others dealing with statutory privileges analogous to the attorney-client privilege.²⁷ In the case of *In re Terry W.*,²⁸ the court, in referring to various statutory provisions regarding the attorney-client privilege, stated that

[t]here are undoubtedly situations where a communication from child to parent falls within the attorney-client or other professional privilege. Where, for example, the communication to the parent is to further the child's interest in communication with, or is necessary for transmission of information to, a lawyer, [citation omitted] a physician, [citation omitted] or a psychotherapist, [citation omitted] the communication is protected by the pertinent statutory privilege.²⁹

It was this reasoning that the Court of Appeal for the Second District relied upon in finding that the analogous psychotherapist-patient privilege applied to communications between parents of a minor and psychiatric hospital personnel even though there was no showing that such communications were made to further the child's interest in receiving psychiatric care.³⁰ In *Grosslight v. Superior Court of Los Angeles County*,³¹ similar communications were held to be absolutely privileged since they were for the purpose of facilitating diagnosis and treatment. The *Grosslight* court found that the minor-patient's age was irrelevant to the privilege's application, although, the child was sixteen and able to communicate with the psychotherapist herself.

While the state courts seem to liberally construe professional privileges when dealing with a minor and communications

25. See note 23 *supra*. Where communications are made in front of third persons who have no interests in common with the client, a reasonable person would not intend that these comments be confidential. Any confidentiality has necessarily been destroyed by their publication.

26. *In re Terry W.*, 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976).

27. See *Grosslight v. Superior Court of Los Angeles County*, 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 (1977). See also CAL. EVID. CODE §§ 952, 992, 1011, 1012 (West 1966).

28. 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976).

29. *Id.* at 748, 130 Cal. Rptr. at 914.

30. *Grosslight v. Superior Court of Los Angeles County*, 72 Cal. App. 3d 502, 140 Cal. Rptr. 278, 280 (1977).

31. 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 (1977).

through the minor's parents,³² the federal courts have expressly committed themselves to a narrow construction of such privileges.³³ It has often been held that since the attorney-client privilege blocks full disclosure in litigation, it will be confined to narrow limits. Other privileges, such as those afforded spouses, have been similarly construed in the attempt to balance protected relationships against the need to bring out all relevant evidence.

III. CASE ANALYSIS

The California Supreme Court found that the mother of Jesse De Los Santos could assert the attorney-client privilege on his behalf under either the statutory language which allows the guardian of a minor to assert the privilege on behalf of the minor,³⁴ or as a third person who is reasonably necessary to facilitating communication between an attorney and his client.³⁵ While the two rationales are interdependent in the court's reasoning, a clearer distinction could have been made.

The first theory, based on the language of the California Evidence Code, seems relatively simple to understand. Section 954 of the code states that the holder of the attorney-client privilege is the client and "a guardian or conservator of the client when the client has a guardian or conservator."³⁶ Since a minor litigant is required to be represented by a guardian,³⁷ and since the guardian holds the minor's privilege to prevent disclosure of confidential communications, the court properly found that Mrs. De Los Santos, as Jesse's guardian ad litem, could assert the privilege

32. *De Los Santos*, 27 Cal. 3d 677, 613 P.2d 233, 166 Cal. Rptr. 172 (1980); *Grosslight v. Superior Court of Los Angeles County*, 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 (1977) (*See* notes 27-31 *supra* and accompanying text); *In re Terry W.*, 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976) (*See* notes 26-30 *supra* and accompanying text.)

33. *Trammel v. United States*, 445 U.S. 40 (1980). The Court held that testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every person's evidence and, as such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good that outweighs the traditionally predominant interest of utilizing all rational means for ascertaining the truth. *United States v. Pipkins*, 528 F.2d 559 (5th Cir. 1975), *cert. denied*, 426 U.S. 952 (1976) (the attorney-client privilege has to be strictly confined within the narrowest possible limits consistent with the logic of its underlying purpose); *In re Ampicillin Antitrust Investigation*, 81 F.R.D. 377 (D.C. Cir. 1978) (the attorney-client privilege, because it blocks the rule requiring full disclosure in the effort to establish the truth, will be confined within narrow limits).

34. 27 Cal. 3d at 682, 613 P.2d at 236, 166 Cal. Rptr. at 175. *See* notes 4 and 5 *supra*.

35. *Id.* at 683, 613 P.2d at 237, 166 Cal. Rptr. at 176.

36. *See* note 5 *supra*.

37. *See* note 9 *supra*.

and refuse to answer questions asked of her by the defendants.³⁸

Further, section 917 of the California Evidence Code gives rise to a presumption that statements given in the course of an attorney-client relationship are made in confidence and places the burden on the opponent of the party claiming the privilege to negate it. Since Jesse's statements to his mother were made in response to questions asked at their attorney's request, the statements were made in the course of an attorney-client relationship and the presumption of section 917 of the California Evidence Code arose.³⁹

The second rationale for the court's holding rests upon the interpretation of section 952 of the California Evidence Code, which defines confidential communications for purposes of applying the privilege.⁴⁰ It states that a communication is still confidential in character even though a third person is present during consultation if the third person is "present to further the interest of the client in the consultation"⁴¹ or disclosure to the third person is "reasonably necessary for the transmission of the information to the lawyer or the accomplishment of the purpose for which the lawyer is consulted. . . ."⁴² The court found that Mrs. De Los Santos, given her capacity as guardian ad litem, was such a third person necessary for the communication between Jesse and his attorney. The court went so far as to assert that "[t]he disclosure to the guardian is unquestionably necessary for the transmission of the information to the attorney or the accomplishment of the purpose for which he is consulted and is therefore protected by the statutory privilege."⁴³

The court relied on the powers granted to a guardian ad litem in conducting litigation on behalf of a minor client to find Mrs. De Los Santos a necessary party to the communication.⁴⁴ The California Code of Civil Procedure⁴⁵ reflects the legislative judgment concerning the necessity of a guardian ad litem or other representative to appear in litigation on behalf of a minor. Such persons are given broad powers to conduct the litigation, to settle, to con-

38. 27 Cal. 3d at 682, 613 P.2d at 236, 166 Cal. Rptr. at 175.

39. *Id.* See also CAL. EVID. CODE § 917 (West 1966).

40. See note 3 *supra*.

41. *Id.*

42. *Id.*

43. 27 Cal. 3d at 684, 613 P.2d at 237, 166 Cal. Rptr. at 176.

44. *Id.*

45. See note 9 *supra*.

trol procedural matters, and to make stipulations.⁴⁶

In consideration of these powers, the court found that Mrs. De Los Santos was essential for transmission of the information contained in Jesse's statements to the attorney for preparation of answers to interrogatories. The holding that Jesse's communications to his mother were privileged rested on the need for her as a guardian to be apprised of all matters in the action.⁴⁷ An informed exercise of Mrs. De Los Santos' powers necessitated her knowledge of such communications.

The court referred to the *Grosslight* case in reiterating the premise that the age of the minor was not relevant to the guardian's powers.⁴⁸ The court further relied on *Grosslight* in stating that there was no statutory requirement that a person acting as an agent who transmits information to an attorney be disinterested in the outcome of the litigation.⁴⁹ The defendants alleged that Mrs. De Los Santos may have withheld certain statements of her son because they were adverse to her own interests in recovering her son's medical expenses.⁵⁰ While there is no authority that requires a client's agent to be disinterested, as the supreme court asserts,⁵¹ the statute requiring representation of a minor by a guardian has been interpreted to require that the guardian's interests not be adverse to those of the minor.⁵² There has been no case decided in California that a guardian's interests must coincide with those of his charge. However, it seems consistent with the adversarial process that a guardian have the same interests as his charge.

IV. CASE IMPACT

The impact of the *De Los Santos* holding will be limited to

46. *Id.*

47. 27 Cal. 3d at 684, 613 P.2d at 237, 166 Cal. Rptr. at 176.

48. *Id.* at 684-85, 613 P.2d at 237-38, 166 Cal. Rptr. at 176-77 (the court also refers to legislative judgment as reflected in the California Evidence Code § 952).

49. *Id.* at 685, 613 P.2d at 238, 166 Cal. Rptr. at 177.

50. *Id.*

51. *Id.*

52. CAL. CIV. PROC. CODE § 372 (West 1973) (*see note 9 supra*); Guardianship of Walters, 37 Cal. 2d 239, 231 P.2d 473 (1951). The fact that there was an action pending by an incompetent against the guardian of her estate personally did not disqualify that guardian from acting in his capacity as guardian of the incompetent's estate since the alleged incompetent's interests were protected by court appointment of a guardian *ad litem*. *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617 (1867) (in an action against a minor, a guardian *ad litem* must be appointed where the guardian has an adverse interest in the subject matter of the suit). *In re Corotto*, 125 Cal. App. 2d 314, 270 P.2d 498 (1954). Appointment of a guardian *ad litem* was necessitated where a testamentary trustee who was also a co-executor was required to maintain a neutral position as between beneficiaries in the controversy both in his position as co-executor and trustee.

those cases where a client is represented by a guardian or conservator. It would be a legal anomaly for the law to require that a guardian represent a minor or incompetent person in litigation⁵³ and then compel that guardian to disclose statements made to him or her in a representative capacity. The holding seems consistent with the purpose of the attorney-client⁵⁴ privilege, which seeks to promote full disclosure of all relevant matters while safeguarding the interest in the minor's ability to openly communicate with his legal representative.

The court's finding that a guardian need not be disinterested in the litigation of his charge seems to be a novel proposition. The court examined past cases which stated similar holdings in relation to a client's agent,⁵⁵ and extrapolated to the instant case where the agent was also the guardian of the client. While there does not appear to be any ethical problems in the situation where the guardian ad litem and the minor have similar interests, problems would present themselves if their interests were adverse.⁵⁶ However, judicial interpretation of the Code of Civil Procedure requiring minors to appear in litigation by a guardian ad litem has already limited the interest shared by the minor and guardian to those that are compatible and not adverse.⁵⁷ Since the guardian, essentially represents the minor, it seems just that he share the minor's interests. Court-appointed guardians are required, for this very reason, to protect and represent the minor's interests. It is no less required where the guardian is the natural parent of the minor.

Finally, the fear expressed by Chief Justice Burger of the United States Supreme Court in *Trammel v. United States*,⁵⁸ that expansion of privileges tends to block legitimate law enforcement

53. See CAL. CIV. PROC. CODE § 372 (West Supp. 1980). See note 9 *supra*.

54. See note 14 *supra* and accompanying text.

55. 27 Cal. 3d at 685, 613 P.2d at 238, 166 Cal. Rptr. at 177. The court states, "there is no requirement in the statute that the person who transmits the client's remarks to the attorney must be wholly disinterested in the action." *Id.* While the court is referring to § 952 of the Evidence Code, which deals with transmission of information by persons necessary for communication, this section does not in any place indicate that the third person is a minor's guardian *ad litem*. Similarly, there is no case under the California Code of Civil Procedure's § 372 which refers to the guardian as an agent with respect to privileges. The only code sections connecting the two subjects are California Evidence Code §§ 951 and 953.

56. See note 52 *supra* and accompanying text.

57. *Id.*

58. 445 U.S. 40 (1980). See note 33 *supra* and accompanying text.

efforts, will not come to pass if the *De Los Santos* holding is limited to the context of civil suits. The *Grosslight*⁵⁹ case, which the California Supreme Court relied upon in *De Los Santos* was also a civil case.

V. CONCLUSION

In sum, the California Supreme Court held that communications from a minor to his guardian ad litem which are transmitted to the minor's attorney are privileged communications. Even those communications not, in fact, transmitted may be privileged, depending on the intent of the person making the communication. The fact that they are relayed via a guardian ad litem does not destroy the confidential character of those communications. Since the guardian is the holder of the attorney-client privilege, he is the person permitted to assert it. Moreover, the guardian need not be disinterested in the case, so long as the interests of the guardian and the minor are not adverse.

VIII. CIVIL PROCEDURE

A. HEARINGS

1. "Own Recognizance" Under California Code of Civil Procedure § 526(a): *Van Atta v. Scott*

In *Van Atta v. Scott*,¹ the California Supreme Court established who should bear the burden of proof and producing evidence in a pretrial hearing on an "own recognizance" release under California Penal Code section 1318.² In determining whether due proc-

59. See notes 27, 31-32 *supra* and accompanying text. *Grosslight* was a suit for personal injuries against a minor and her parents.

1. 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980). This was a taxpayer action filed pursuant to California Code of Civil Procedure § 526(a) attacking "own recognizance" release procedures in the city and county of San Francisco. The trial court found the challenged procedure to be in violation of the due process clauses of the federal and state constitutions. Furthermore, the court found that the prosecution was not required to assume the burden of proving that bail is necessary to assure the presence of the detainee in court, and the courts are not required to furnish a written statement of reasons for denial of own recognizance release.

2. See *In re Podesto*, 15 Cal. 3d 921, 544 P.2d 1297, 127 Cal. Rptr. 97 (1976) (in an OR proceeding the court must consider (1) the detainee's ties to the community, (2) the detainee's record of appearance at past court proceedings, and (3) the severity of the sentence the detainee faces); *In re Underwood*, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973) (the sole issue at an OR hearing is whether the detainee will appear for subsequent court proceedings if released on his "own recognizance").

ess was being met with regard to present procedures, the court balanced the detainee's liberty interest against the state's interest of assuring that the detainee would be present at future court proceedings.³ The court held that the detainee's innocence should be presumed⁴ and that the burden of proof concerning the detainee's likelihood of appearance at future court proceedings should be borne by the prosecution.⁵ The burden of producing evidence on the detainee's record of appearance at prior hearings and as to the severity of the sentence facing the detainee was also placed on the prosecution.⁶ However, since the detainee has more knowledge and more incentive, and it is easier and less costly for him than the prosecution, the court held the detainee has the burden of producing evidence concerning his community ties in the jurisdiction (i.e., job, income, family, property, etc.).⁷

3. By depriving a detainee of his liberty interest, not only does the detainee lose his freedom, but also his ability to prepare an adequate defense is greatly curtailed, consultation with an attorney is severely impaired, loss of income and often employment mean the detainee's ability to retain his own lawyer may be limited, and by entering the courtroom in custody subtle prejudices may be created in the judge and jury which might interfere with the detainee's right to a free trial. 27 Cal. 3d at 435-36, 613 P.2d at 215, 166 Cal. Rptr. at 154. In addition to assuring presence at future court proceedings the government also has "a substantial interest in seeing that it achieves its objective of assuring the accused's presence at future proceedings at a reasonable cost." *Id.* at 437, 613 P.2d at 216, 166 Cal. Rptr. at 155. See *People v. Ramirez*, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979) (the extent of procedural due process available depends on the careful weighing of the private and governmental interests); *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (personal liberty is a fundamental interest and entitled to the same due process protection as other fundamental interests).

4. See *Patterson v. New York*, 432 U.S. 197 (1977). The legislature can not presume someone to be guilty merely upon the finding of an indictment or proof of the identity of the accused.

5. 27 Cal. 3d at 441-444, 613 P.2d at 219-20, 166 Cal. Rptr. at 158-59. The court found three values in this. It would preserve the respect for the individual's liberty and presumption of innocence. The respect and confidence of the community in uniform application of the law would be maintained. Finally, certain inherent biases in the OR decision making process would be corrected. See Comment, *The Bail System and Equal Protection*, 2 Loyola L.A. L. Rev. 71 (1969); Note, *Pretrial Release in California: Proposed Reforms of an Unfair System*, 8 Pac. L.J. 841 (1977); Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441.

6. 27 Cal. 3d at 439, 613 P.2d at 217, 166 Cal. Rptr. at 156. The court concluded that the severity of the potential sentence could be easily determined by looking at the complaint and relevant penal code section. Likewise, obtaining the detainee's past record would be relatively easy and inexpensive for the prosecution to secure.

7. If this were not the case, the court felt either the OR hearings would have to be delayed while the prosecution got the evidence, thereby causing longer detention, or the hearing would have to go on. If the prosecution could not meet this

This decision liberalizes the "own recognizance" release procedure considerably and brings California in line with other jurisdictions.⁸ The court also made it quite clear that the decision to release a detainee on his "own recognizance" is still discretionary with the judge and that such a release is not a right of the detainee.⁹

B. PLEADING

1. *Compensatory Damages in Excess of Prayer Amount Under California Code of Civil Procedure Section 580: Becker v. S.P.V. Construction Company*

In *Becker v. S.P.V. Construction Company*¹ the California Supreme Court clarified its interpretation of section 580 of the California Code of Civil Procedure.² Section 580 provides that any relief granted to a plaintiff in a case involving a default judgment may not exceed the amount demanded in plaintiff's complaint. Where a plaintiff's complaint seeks more than one type of money damages, such as compensatory and punitive damages, the court

burden of proof then many ineligible detainees might be released. *Id.* at 438, 613 P.2d at 216-17, 166 Cal. Rptr. at 155-56. The court went on to hold that the Constitution does not compel a trial judge to issue a written statement of reasons whenever OR release is denied. *Id.* at 444-46, 613 P.2d at 220-22, 166 Cal. Rptr. at 159-61.

8. See *Wood v. United States*, 391 F. 2d 981 (D.C. Cir. 1968) (the Bail Reform Act creates a strong policy in favor of release on personal recognizance). Oregon and the District of Columbia also operate under systems with this same presumption. See 18 U.S.C. § 3146; OR. REV. STAT., § 135.24(3). Cf. Bowman, *The Illinois Ten Per Cent Bail Deposit Provision*, 1965 U. Ill. L. F. 35. For an analysis of other developing systems, see Comment, *Travels in Own Recognizance Release: From Manhattan to California*, 5 PAC. L.J. 675 (1974).

9. See *In re Podesto*, 15 Cal. 3d 921, 544 P.2d 1297, 127 Cal. Rptr. 97 (1976). A trial judge's discretion can not be exercised arbitrarily. In the case of a convicted felon waiting on appeal, a judge may consider the likelihood of defendant's flight, potential danger to society, and lack of diligence in prosecuting his appeal.

1. 27 Cal. 3d 489, 612 P.2d 915, 165 Cal. Rptr. 825 (1980). Becker had been awarded a default judgment against SPV Construction Company when SPV failed to answer Becker's complaint alleging breach of contract, fraud and negligent representation due to the faulty construction of Becker's home. The default judgment was subsequently vacated and in an appeal by Becker, the California Supreme Court held that Becker's claim for compensatory damages "in excess of \$20,000" was not adequate notice under section 580 of the California Code of Civil Procedure to inform SPV Construction of its potential liability. 27 Cal. 3d at 494, 612 P.2d at 918, 165 Cal. Rptr. at 828.

2. 27 Cal. 3d at 394, 612 P.2d at 918, 165 Cal. Rptr. at 828. "The primary purpose of this section [580] is to insure that defendants in cases which involve a default judgment have adequate notice. . . ." *Id.* at 493, 612 P.2d at 917, 165 Cal. Rptr. at 827.

See also *Anderson v. Mart*, 47 Cal. 2d 274, 282, 303 P.2d 539, 544 (1956). Section 580 was made applicable to a property settlement agreement in a divorce proceeding. The court was allowed to grant less than the amount sought in the complaint, but not more.

states that such damages are different remedies and therefore, a demand for one is not a demand for the other.³ As a result, if a trial court awards a recovery of one type of damages in excess of the prayer for those specific damages, but the award is still lower than the total amount of damages demanded, the trial court has still exceeded its jurisdiction and violated section 580.⁴

IX. CORPORATE LAW

A. SECURITIES LAW

1. *Sale of Stock in Privately Owned Business Under Corporate Securities Law Section 25104: Fox v. Ehrmantraut*

Fox v. Ehrmantraut,¹ interpreted the 1968 amendment to section 25104 of the corporate securities law and concluded that the sale of all outstanding shares in a privately owned business with the intention of relinquishing all control and rights to profits to the purchaser was included in the qualification requirement exemption of section 25104 even though the sale was accomplished through an advertisement.² The case clarified the exemption³ by limiting those transactions excluded from it to those where a right

3. 27 Cal. 3d at 494-95, 612 P.2d at 918, 165 Cal. Rptr. at 828; *see also* Gudarov v. Hadjieff, 38 Cal. 2d 412, 417, 240 P.2d 621, 623 (1952) ("The two [compensatory and punitive damages] differ in nature and purpose. One is given as compensation; the other purely as punishment. . . ."); Note, *Default Judgments in Excess of Prayer*, 4 STAN. L. REV. 278 (1952).

4. 27 Cal. 3d at 494-95, 612 P.2d at 918, 165 Cal. Rptr. at 828. "If no specific amount of damages is demanded, the prayer cannot insure adequate notice of the demands made upon defendant." *Id.* *See* Ludlea v. Memory Magnetics Int'l, 25 Cal. App. 3d 316, 323, 101 Cal. Rptr. 615, 619 (1972) (an award of \$17,500 was held to be void because the plaintiff failed to demand a specific dollar amount in his complaint).

1. 28 Cal. 3d 127, 615 P.2d 1383, 167 Cal. Rptr. 595 (1980).

2. Section 25130 of the Corporate Securities Law of 1968 provides: "It is unlawful for any person to offer or sell any security in this state in any nonissuer transaction unless it is qualified for such sale. . . or unless such security or transaction is exempted under chapter 1 (commencing with § 25100) of this part." CAL. CORP. CODE § 25130 (West 1977). The exemption interpreted by the court to include the *Fox* transaction reads in pertinent part: "(a) Any offer or sale of a security by the bona fide owner thereof for his own account if the sale (1) is not accompanied by the publication of any advertisement and (2) is not effected by or through a broker-dealer in a public offering [is exempted from § 25130]." CAL. CORP. CODE § 25140 (West 1977).

3. *See* CAL. CORP. CODE § 25104 (West 1977) note 2 *supra*.

to share in the profits or proceeds of a business conducted by others is obtained by the sale.⁴

Fox also interpreted the Franchise Investment Law section 31102 exemption⁵ from the registration requirement of section 31110⁶ by holding that the franchise exemption is lost only if a franchisor obtains all or a substantial part of the purchase price.⁷

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4. The court found that the purpose of the 1968 amendment to the § 25104 exemption provision was "to eliminate any qualification requirement with respect to what are essentially private transactions by a person in his own property and to require such qualification *only* where a *public* market is created in outstanding securities." *Fox v. Ehrmantraut*, 28 Cal. 3d 127, 138, 615 P.2d 1383, 1388, 167 Cal. Rptr. 595, 600 (1980) (quoting 1 MARSH & VOLK, PRACTICE UNDER THE CALIFORNIA SECURITIES LAWS 10-18.7 (rev. ed. 1979) (emphasis added)).

The court distinguished between transactions which "constitute agreements with persons who expect to reap a profit from their own services or other active participation in a business venture," as presented in this case, from transactions which contemplate "the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers are to share." *Id.* at 139, 615 P.2d at 1388, 167 Cal. Rptr. at 600 (quoting *People v. Syde*, 37 Cal. 2d 765, 768-69, 235 P.2d 601, 603 (1951)).

See also *Austin v. Hallmark Oil Co.*, 21 Cal. 2d 718, 134 P.2d 777 (1943); *People v. Davenport*, 13 Cal. 2d 681, 91 P.2d 892 (1939); *Domestic & Foreign Pet. Co. v. Long*, 4 Cal. 2d 547, 51 P.2d 73 (1935); *People v. Hoshor*, 92 Cal. App. 2d 250, 206 P.2d 882 (1949); *Hollywood State Bank v. Wilde*, 70 Cal. App. 2d 103, 106 P.2d 846 (1945); *People v. Steele*, 2 Cal. App. 2d 370, 36 P.2d 40 (1934).

5. The section 31102 exemption reads as follows:

The offer or sale of a franchise by a franchisee for his own account or the offer or sale of the entire area franchise owned by a subfranchisor for his own account, is exempted from [the registration requirement of § 31110] if the sale is not effected by or through a franchisor. A sale is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove a different franchisee.

CAL. CORP. CODE § 31102 (West 1977).

6. Section 31110 provides:

"[I]t shall be unlawful for any person to offer or sell any franchise in this state unless the offer of the franchise has been registered under this part or exempted. . . ."

CAL. CORP. CODE § 31110 (West 1977).

7. In coming to this conclusion, the court held that a sale is not "effected by or through a franchisor" merely because the franchisor furnished information to the prospective franchisee or referred prospective purchases to the franchisee. The court reasoned that any potential franchisee would be *expected* to seek information from the franchisor and therefore, the exemption would be "meaningless if franchisor responses to such inquiries served to deprive franchises of the exemption." 28 Cal. 3d at 142, 615 P.2d at 1390, 167 Cal. Rptr. at 602.